ONTARIO
LABOUR RELATIONS BOARD

ANNUAL REPORT
1984-85

86-02335/

ONTARIO LABOUR RELATIONS BOARD

Chairman	JUDGE R.S. ABELLA
Alternate Chairman	I.C.A. SPRINGATE
Vice-Chairmen	L.R. BETCHERMAN E.N. DAVIS R.F. EGAN D.E. FRANKS H. FREEDMAN R.A. FURNESS O.V. GRAY R.D. HOWE P. KNOPF R.O. MACDOWELL M.G. MITCHNICK N.B. SATTERFIELD S.A. TACON

Members

B.L. ARMSTRONG
C.A. BALLENTINE
D.H. BLAIR
F.C. BURNET
L.C. COLLINS
W.A. CORRELL
M. EAYRS
R.J. GALLIVAN
A. GRANT
P.V. GRASSO
A. GRIBBEN
J. KENNEDY
H. KOBRYN
L. LENKINSKI
R.D. McMURDO
F.W. MURRAY
J.W. MURRAY
S. O'FLYNN
P.J. O'KEEFFE
R.W. PIRRIE
R. REDFORD
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J.A. RONSON
M.A. ROSS
W.F. RUTHERFORD
I.M. STAMP
R.J. SWENOR
E.G. THEOBALD
W.H. WIGHTMAN
J.P. WILSON
N.A. WILSON
R. WILSON

Registrar and Chief Administrative Officer	D.K. AYNSLEY
Board Solicitors	N.V. DISSANAYAKE, R.J. HERMAN, AND F.W. McINTOSH-JANIS

ONTARIO
LABOUR RELATIONS BOARD

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1984-85

Ontario

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Ontario
Labour Relations
Board

Commission
des relations
de travail de l'Ontario

Office of the
Chairman

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président

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Toronto, Ontario
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The Honourable William Wrye,
Minister of Labour,
400 University Avenue,
Toronto, Ontario,
M7A 1T7.

Dear Minister:

It is my pleasure to provide to you the fifth Annual Report of the Ontario Labour Relations Board for the period commencing April 1, 1984 to March 31, 1985.

Sincerely,

Judge Rosalie S. Abella,
Chairman.

CHAIRMAN'S MESSAGE

Despite a significant turnover in Board personnel this year and thanks largely to the immeasurable contribution of Don Aynsley, the Board's Registrar, as well as to the redoubtable commitment on the part of the Board's Vice-Chairmen and Members and Labour Relations Officers, the Ontario Labour Relations Board experienced an exceptionally productive year. With the assistance of a new Manager of Administration (Virginia Robeson), a new Alternate Chairman (Ian Springate), a Board Solicitor (Robert Herman) and Manager of Field Services (Jack MacDonald), revised administrative measures were introduced to maintain the Board's ability to respond effectively to the pronounced increase in caseload. Through the creative and complex analysis in the jurisprudence of the Vice-Chairmen and Board Members, many new parameters in labour relations were delineated and many old ones clarified. That they were able so regularly to produce decisions of such exemplary quality, despite the overwhelming time burdens the Board's personnel shortages imposed on them, reflects the calibre of their professionalism and talent.

As is the case every year, the Board is both deeply indebted to and proud of the work of its Labour Relations Officers. As the Board's caseload increased dramatically, so did the pressure on these officers. Yet as the figures contained in the Annual Report show, their ability to effect settlements remained consistently and impressively high. If anything, their indispensability to the Board has increased. The Board personnel and support staff have been supremely hardworking, and dedicated to serving the Board and its public. The three Board solicitors and the articling students have inexhaustibly supplied advice and research to help in the formulation of legal, procedural, policy and administrative directions. The library retains its excellent reputation for a comprehensive and up-to-date research and information base.

We all look forward to continuing to provide a fair, effective and accessible tribunal to the labour relations community in the coming year and to the benefit of this community's observations and assistance in the achievement of this objective.

I INTRODUCTION

The Ontario Labour Relations Board commenced publication of its own Annual Report in the fiscal year 1980-81. This issue covers the fiscal year April 1, 1984 to March 31, 1985.

The report contains uptodate information on the organizational structure and administrative developments of interest to the public and notes changes in personnel of the Board. As in previous years, this issue provides a statistical summary and analysis of the work-load carried by the Board during the fiscal year under review. Detailed statistical tables are provided on several aspects of the Board's function.

This report contains a section highlighting some of the significant decisions of the Board issued during the year. A brief description of every Board matter that was subject to review by the courts during the year is provided. Since many of these court decisions are unreported, the summaries in the Board's Annual Report have been helpful to the practising bar. The report continues to provide a legislative history of the *Labour Relations Act* and notes the amendments to the Act that were passed during the fiscal year.

II A HISTORY OF THE ACT

In 1943, the Ontario Legislature engaged in one of the first attempts in Canada to institute an effective scheme of compulsory collective bargaining. *The Collective Bargaining Act, 1943*, S.O. 1943, c. 4 came about as a result of a public hearing before a select committee of the Provincial Legislative Assembly. Although the establishment of a "Labour Court" was not strenuously lobbied for by any of the interest groups which made submissions to the Select Committee, it was this option which the Select Committee saw fit to endorse. The Committee's report, in the form of a draft bill, was submitted to the Legislature on March 25th, 1943, and when enacted on April 14th, 1943, legitimized collective bargaining in Ontario under the Ontario Labour Court, which was a division of the Supreme Court of Ontario.

The Act of 1943 abolished the common law doctrines of conspiracy and restraint of trade as they had applied to trade unions, and gave employees a right to participate in union activity. A union was permitted to apply for certification as the bargaining agent for a group of employees. The Court had power to ascertain the appropriate unit for the purpose of collective bargaining. It has been pointed out that:

> "... the shape and structure of the collective bargaining system was to be determined by a court which was expected to develop policies that would promote orderly collective bargaining. It was recognized that the scheme of the Act involved both administrative and judicial functions. The Court was also empowered to delegate its non-judicial responsibilities so that it could develop an administrative infra-structure to support its 'judicial' role." (MacDowell, R.O., "Law and Practice before the Ontario Labour Relations Board, (1978), 1 Advocate's Quarterly 198 at 200.)

The Act contained several features which are standard in labour relations legislation today – management dominated organizations could not be certified; managerial employees were excluded from the Act; employers could not discriminate against employees for participation in union activity; employers were required to recognize a certified bargaining agent; and there was a duty to bargain in good faith. The Labour Court had broad remedial powers – something which the Ontario Labour Relations Board would not have for many years. The Labour Court was the only forum for resolution of disputes arising under a collective agreement. This function was to be performed without cost to the parties. It is now performed by private boards of arbitration or sole arbitrators and, when disputes arise in the construction industry, by the Labour Relations Board.

The Ontario Labour Court was to have a short lifespan (it opened in June 1943, and heard its last case in April, 1944). In his book, *The Ontario Labour Court 1943-44*, (Queen's University Industrial Relations Centre, Kingston, 1979), John A. Willes gives the following reasons for the Court's early demise: –

> "... the trade unions were complaining about the high cost of proceedings before the Court, the Judges were not eager to deal with labour matters under the Act, and most important, the Conservative party, that had promised to repeal the legislation if elected, formed the government in Ontario in the Spring of 1944."

The immediate circumstances which brought about the demise of the Labour Court (and hence the formation of a Board) was a war time move by the Federal Government to centralize labour relations law. Owing to the division of powers between the Dominion and Provincial Governments, control over labour relations in Canada is shared between the two levels of government depending on whether the undertaking falls under Federal or Provincial jurisdiction. In 1907, the Federal Government attempted to bring labour disputes in public utilities and coal mines under Federal control by means of *The Industrial Disputes Investigation Act*. Disputes in other industries were often brought voluntarily within the provisions of the Act. In 1925 this Act was held by the Privy Council to be *ultra vires* the Dominion Parliament because it infringed on the Provincial power over “property and civil rights.” (*Toronto Electric Commissioners v. Snider*, [1925] A.C. 396; [1925] 2 D.L.R. 5)

The Act was subsequently amended so as to encompass only those industries within Federal jurisdiction. This left labour relations largely in the hands of the Provincial legislatures, although by virtue of a clause in the Federal Act, Provinces could, in effect, “opt in” to the Federal system (all the Provinces except Prince Edward Island exercised this option for a time). However, given the constitutional situation in Canada, decentralization of labour policy was inevitable and the Ontario regime was representative of this decentralization. However, the fact that Canada was at war allowed the Federal Government to rely on its emergency power to pass Order in Council P.C. 1003. This Order adopted the general principles of the American *Wagner Act*, and called for an independent regulatory authority. The Ontario Labour Court was replaced by the Ontario Labour Relations Board, pursuant to *The Labour Relations Board Act, 1944*, S.O. 1944, c. 29, which was subject to the federal Wartime Labour Relations Board. The Chairman of the fledgling Ontario Board was Jacob Finkleman, who had been the registrar of the Labour Court.

In 1947, the Ontario Labour Relations Board became independent of the Federal Government by virtue of *The Labour Relations Board Act, 1947*, S.O. 1947, c. 54. The next year, *The Labour Relations Act, 1948*, S.O. 1948, c. 51, was passed. The 1948 Act, which was enacted in anticipation of new Federal legislation, repealed the earlier *Labour Relations Board* Acts and empowered the Lieutenant-Governor in Council to make regulations “in the same form and to the same effect as that ... Act which may be passed by the Parliament of Canada at the session currently in progress ...” This Act was basically transitional in nature, since work was already under way on the drafting of separate Provincial legislation, which made its first appearance in *The Labour Relations Act, 1950*, S.O. 1950, c. 34.

The major function of the Board was, and still remains, certifying trade unions as bargaining agents. The history of the Board is largely a history of the acquisition of new powers and functions, as new ways of dealing with the problems inherent in industrial relations developed. Initially, however, the Board's role was fairly limited. There was no enforcement mechanism at the Board's disposal in 1950. The major enforcement method was prosecution, in which case the Board had to grant consent to prosecute. The Board had the power to declare a strike or lockout unlawful, but this in itself fell short of being a very complete remedy. In a situation where an individual had been refused employment, discharged, discriminated against, threatened, coerced, or otherwise dealt with contrary to the Act, the appropriate remedy lay in an inquiry by a conciliation officer who then reported to the Minister who in turn could make an appropriate order.

Thus, outside of granting certifications and decertifications, the Board's power was quite limited. The power to make certain declarations, determinations, or to grant consent to prosecute under the Act was remedial only in a limited way. Of some significance during the fifties was the Board's acquisition of the power to grant a trade union "successor" status. (*The Labour Relations Amendment Act, 1956*, S.O. 1956, c. 35). In 1962, the complementary section providing for the preservation of bargaining rights in the case of "successor employers" was passed and was later expanded so as to preserve existing collective agreements. (*The Labour Relations Amendment Act, 1961-62*, S.O. 1961-62, c. 48; *The Labour Relations Amendment Act, 1970*, S.O. 1970, c. 85.)

The Labour Relations Amendment Act, 1960, S.O. 1960, c. 54, made a number of changes in the Board's role. Most importantly, the Board received the authority to order reinstatement with or without compensation. In conjunction with this new power was the power to designate a field officer to investigate complaints. The Board's reinstatement and compensation orders could be filed in the Supreme Court of Ontario and were enforceable as orders of that Court. The Board also received the power to refer jurisdictional disputes to a new jurisdictional disputes commission which had the power to make interim orders or directions. The Board was given limited power to review the directions. As with the Board's reinstatement and compensation orders, the interim orders could be filed with the Supreme Court and thus become enforceable as orders of that Court. The Board also received the power to set a terminal date for the filing of membership evidence and evidence opposing certification, and the discretion to refuse to "carve out" a craft unit where there was a history of industrial organization in a plant. In 1960 provision was also made for pre-hearing representation votes.

In 1962, *The Labour Relations Amendment Act, 1961-62*, added new provisions to the Act in order to respond to unique problems which were evident in the construction industry. This industry was given a separate but somewhat similar regime under the Act in response to recommendations made in the "Goldenberg Report" (*Report of The Royal Commission on Labour Management Relations in the Construction Industry*," March, 1962). Provision was made for determination of bargaining units by reference to geographic areas rather than particular projects. The Board, in consultation with interested parties, divided the province geographically for the purpose of certification in the construction industry. Labour policy with regard to the construction industry has continued to evolve. Legislation was introduced in 1977 to provide for province-wide bargaining in the industrial, commercial, and institutional sector of that industry in response to the recommendations contained in the "Franks Report" ("*Report of the Industrial Inquiry Commission into Bargaining Patterns in the Construction Industry in Ontario*," May, 1976). (*The Labour Relations Amendment Act, 1977*, S.O. 1977, c. 31). Further amendments were made to the Act in relation to the construction industry in 1979 and 1980. *The Labour Relations Amendment Act, 1979 (No. 2)*, S.O. 1979, c. 113, and *The Labour Relations Amendment Act, 1980*, S.O. 1980, c. 31, extended the bargaining rights held by trade unions in the construction industry for any particular employer in relation to the industrial, commercial and institutional sector of the industry; prohibited selective strikes and lock-outs; and provided for an expeditious ratification procedure.

In 1970, by virtue of *The Labour Relations Amendment Act, 1970*, The Board received a significant extension to its remedial authority. Provision was made for authorization of a Labour Relations Officer to inquire into certain complaints with a view to settling the matters. The most interesting addition to the situations in which the Board could make remedial orders was in the case of a breach of the newly created "duty of fair representation." This duty, imposed on trade unions, required them not to act in a manner which was arbitrary, discriminatory, or in bad faith in their representation of employees for whom they hold bargaining rights. More recently, this duty has been extended to cover referral of persons to work. The Board also received the power to make "cease and desist" orders with respect to unlawful strikes and lock-outs in the construction industry, which would be filed with the Supreme Court and be enforceable as orders of the Court.

A major increase in the Board's remedial powers under the *Labour Relations Act* occurred in 1975. (*The Labour Relations Amendment Act, 1975*, S.O. 1975, c. 76). The Board was permitted to authorize a Labour Relations Officer to inquire into any complaint alleging a violation of the *Labour Relations Act*. A settlement reached by the parties and put into writing was binding on the parties, and a breach of such settlement could be dealt with in the same fashion as a breach of a provision of the Act. The Board's remedial powers were extended to all violations of the Act, and orders of the Board were enforceable in the same way that an order of the Supreme Court is enforceable. The Board also received authority to make "cease and desist" orders with respect to any unlawful strike or lock-out. It was in 1975 as well, that the Board's jurisdiction was enlarged to enable it to determine grievances in the construction industry referred to it by one of the parties to a collective agreement.

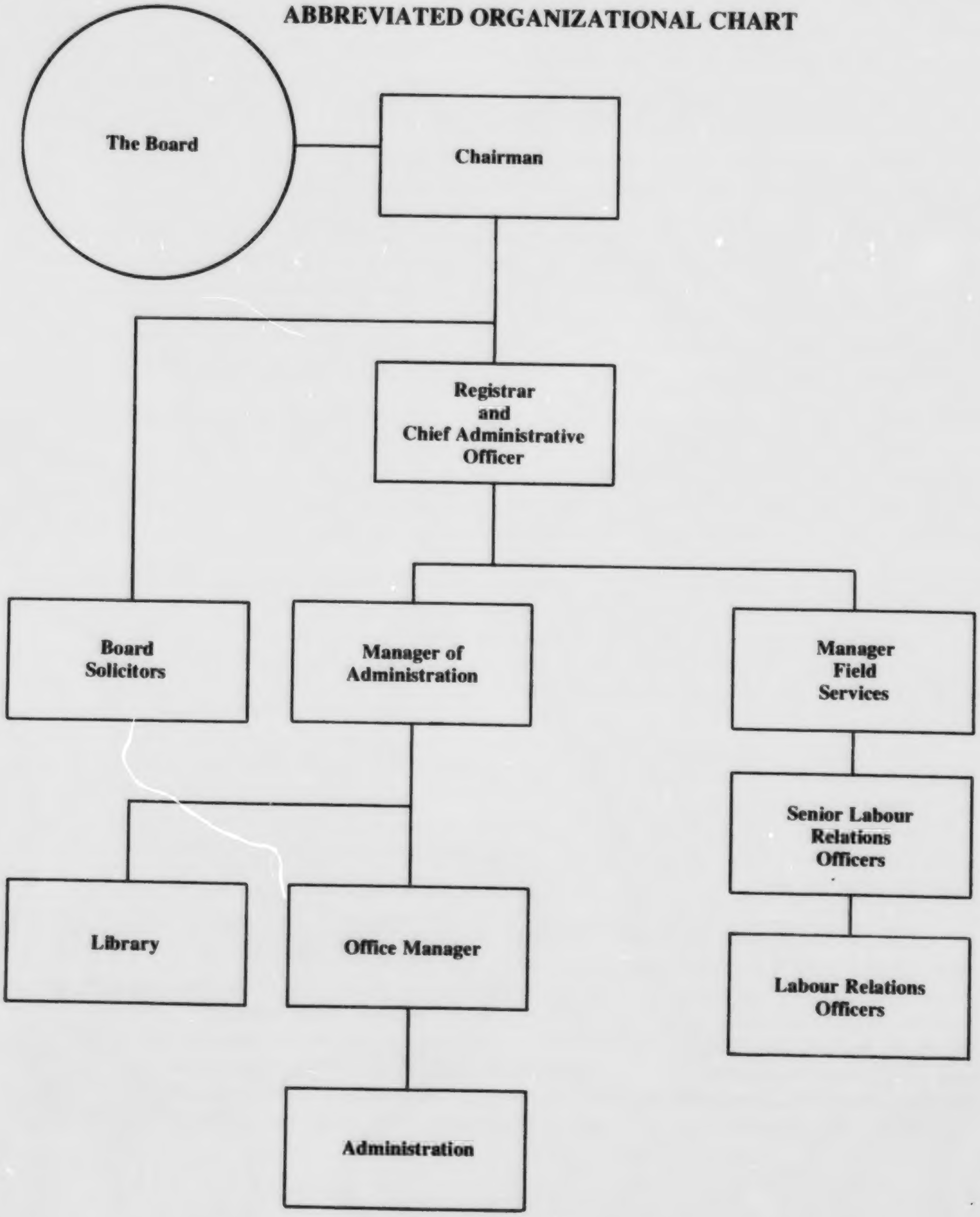
In June of 1980, the *Labour Relations Amendment Act, 1980 (No. 2)*, S.O. 1980, c. 34, was passed providing for compulsory check-off of union dues and the entitlement of all employees in a bargaining unit to participate in ratification and strike votes. Provision was also made for the Minister of Labour to direct a vote of the employees in a bargaining unit on their employer's final offer at the request of their employer. In June of 1983, the *Labour Relations Amendment Act, 1983*, S.O. 1983, c. 42 became law. It introduced into the Act section 71a, which prohibits strike related misconduct and the engaging of or acting as, a professional strike-breaker. To date the Board has not been called upon to interpret or apply section 71a.

During the year under review, the *Labour Relations Amendment Act, 1984*, S.O. 1984, c. 34 was enacted. This Act, which received Royal Assent on June 27, 1984, deals with several areas. It gives the Board explicit jurisdiction to deal with illegal picketing or threats of illegal picketing and permits a party affected by illegal picketing to seek relief through the expedited procedures in sections 92 and 135, rather than the more cumbersome process under section 89. The Act also permits the Board to respond in an expedited fashion to illegal agreements or arrangements which affect the industrial, commercial and institutional section of the construction industry. It further establishes an appropriate voting constituency for strike, lockout and ratification votes in that sector and provides a procedure for complaints relating to voter eligibility to be filed with the Minister of Labour. The new amendment also eliminates the 14 day waiting period before an arbitration award which is not complied with may be filed in court for purposes of enforcement.

III BOARD ORGANIZATION

The following is an abbreviated organizational chart of the Ontario Labour Relations Board:

ABBREVIATED ORGANIZATIONAL CHART


The Board
Chairman
Registrar and Chief Administrative Officer
Board Solicitors
Manager of Administration
Manager Field Services
Senior Labour Relations Officers
Library
Office Manager
Labour Relations Officers
Administration

IV THE BOARD

The legislative policy regarding labour relations in the Province of Ontario is set out in the preamble to the *Labour Relations Act*, R.S.O. 1980, c. 228, as follows:

> "... it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees."

With this policy as a basis, the Act confers on the Ontario Labour Relations Board the authority over many important aspects of collective bargaining such as certification of trade unions, unfair labour practices, unlawful strikes and lock-outs, jurisdictional disputes, and arbitration of grievances in the construction industry. In order to carry out this mandate the Board is composed of a Chairman and an Alternate Chairman, several Vice-Chairmen and a number of Members representative of labour and management respectively in equal numbers. At the end of the fiscal year the Board consisted of the Chairman, Alternate Chairman, 10 full time Vice-Chairmen, 4 part-time Vice-Chairmen and 32 Board Members, 10 full-time and 22 part-time. These appointments are made by the Lieutenant-Governor in Council.

Created by statute, the Ontario Relations Board is best described as a quasi-judicial body, combining as it does, administrative and judicial functions. The Board attempts to avoid being overly technical or legalistic in making its determinations and relies heavily on the efforts of its Labour Relations Officers in encouraging settlements without the need for formal hearings. The Board strives to keep its procedures informal, expeditious and fair.

The Board, under section 106(1) of the Act, has the exclusive jurisdiction to exercise the powers conferred upon it by or under the Act and to determine all questions of fact or law that arise during any hearing before it. The Board's decisions are not subject to appeal and a privative clause in the statute limits the scope for judicial review. However, the Board has the power to reconsider any of its decisions, either on its own initiative or at the request of an affected party.

The Board has the power to determine its own practices and procedures. The publication entitled *Rules of Procedure, Regulations and Practice Notes* (Queen's Printer, Ontario) contains the established regulations, procedures and practices of the Board. New Practice Notes are published by the Board in its Monthly Report from time to time. During the year under review a new practice note dealing with applications for reconsideration was issued. (Practice Note No. 17, dated March 1, 1985.)

The Ontario Labour Relations Board has a somewhat limited role to play with respect to much of the collective bargaining viewed as falling within the public sector. For example, the Board does not have jurisdiction over crown employees, policemen or firemen, and has only a limited jurisdiction with respect to teachers in the schools and community colleges in the province. See the *School Boards and Teachers Collective Negotiations Act*, R.S.O. 1980, c. 464 and the *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 464. On the other hand, the Board has full jurisdiction over employees employed by municipalities and hospitals. A distinct piece of legislation, the *Hospital Labour Disputes Arbitration Act*, stipulates special laws that govern labour relations of hospital employees, particularly with respect to the resolution of collective bargaining disputes and the *Successor Rights (Crown Transfers) Act*, R.S.O. 1980, c. 489 provides for application to the Board where there is a transfer of an undertaking from the crown to an employer and vice versa. The Board is also given an important role under the *Occupational Health and Safety Act*, R.S.O. 1980, c. 321. A similar jurisdiction is conferred on the Board by section 134b of the *Environmental Protection Act*, R.S.O. 1980, c. 141, proclaimed in November 1983 by S.O. 1983, c. 52, s. 22. During the year under review the Board was required on several occasions to determine the impact of the *Canadian Charter of Rights and Freedoms* on the rights of parties under the *Labour Relations Act*.

Apart from its adjudicative function, the Board's operations may be broadly divided into the following areas: (a) Administrative Division, (b) Field Services and (c) Legal Services.

(a) ADMINISTRATIVE DIVISION

The Registrar and Chief Administrative Officer is the senior administrative official of the Board. He is responsible for supervising the day-to-day administrative and field operations of the Board. Every application received by the Board enters the system through the Registrar's office. He determines the hearing dates, assures the effective and speedy processing of each case and communicates with the parties in all matters relating to the scheduling of hearings, the holding of votes or particular problems in the processing of any given case.

The Ontario Labour Relations Board is faced with a substantially increasing caseload, and the continuing demands of the parties appearing before it for quick justice. Faced with these conflicting pressures, the ability of the Board to efficiently manage its caseload within the resources allocated to it underpins much of its contribution to labour relations harmony in this province.

The Manager of Administration and the Manager of Field Services report directly to the Registrar and Chief Administrative Officer. The former manages the day-to-day administrative operation and the latter the field services. An Administrative Committee comprised of the Chairman, Alternate Chairman, Registrar and Chief Administrative Officer, Manager of Administration, Manager Field Services and a Solicitor meets regularly to discuss all aspects of Board administration and management.

The administrative division of the Board includes: office management, case monitoring, and library services.

1. Office Management

An administrative support staff of approximately 60, headed by an Office Manager who reports to the Manager of Administration and a Senior Clerical Supervisor, process all applications received by the Board.

2. Case Monitoring

The Board continues to rely on its computerized case monitoring system. Data on each case are coded on a day-to-day basis as the status changes. Reports are then issued on a weekly and monthly basis on the progress of each proceeding from the filing of applications or complaints to their final disposition.

By monitoring cases on a day-to-day basis, the Board is able to pinpoint problems and delays and address them quickly. The monitoring system and its reports provide statistical information to senior management that is used as a basis for recommendations regarding improvements or changes in Board practices and procedures which can lead to increased productivity and better service to the community.

3. Library Services

The Ontario Labour Relations Board Library employs a staff of 3, including a fulltime professional librarian. The Library staff provides research services for the Board and assists other library users.

The Board Library maintains a collection of approximately 1000 texts, 100 journals and 25 case reports in the areas of industrial relations, labour, contract, evidence, constitutional and administrative law. The library has approximately 4000 volumes. The collection includes decisions from other jurisdictions, such as the Canada Labour Relations Board, the U.S. National Labour Relations Board and provincial labour boards from across Canada.

The Library staff maintains a computer index to the Board's Monthly Report of decisions. It provides access by subject, party names, file number, statutes considered, cases cited, date etc. The system also provides a microfiche index to the decisions. It permits Board members and staff prompt and accurate access to previous Board decisions dealing with particular issues under consideration. The Board is the first labour relations tribunal in Canada to develop and implement this type of system. It has been reviewed by officials from a number of labour relations boards and may be used as a model in the development of other computerized retrieval systems.

(b) FIELD SERVICES

In view of the Board's continuing belief that the interests of parties appearing before it, and labour relations in the province generally, are best served by settlement of disputes by the parties without the need for a formal hearing and adjudication, the Board attempts to make maximum use of it's labour relations officers' efforts in this area. Responsibility for the division lies with the Manager of Field Services. In promoting overall efficiency, the manager puts emphasis upon the setting and monitoring of performance standards, case assignments, staff development and maintaining liaison with the Board. He is assisted by three Senior Labour Relations Officers, each of whom is assigned a team of officers. In addition to undertaking their share of the caseload in the field, these Senior Labour Relations Officers are responsible for providing guidance and advice in the handling of particular cases, managing the settlement process on certification days on a rotating basis, and assisting with the performance appraisals of the officers. In addition to the Labour Relations Officers, the Board employs two Returning/Waiver Officers. They conduct representation votes directed by the Board, as well as last offer votes directed by the Minister of Labour. (See Sec. 40 of the Act) They also carry out the Board's programme for waiver of hearings in certification applications.

The Board's field staff continued its excellent record of performance throughout the fiscal year under review. In relation to complaints under the *Labour Relations Act* and the *Occupational Health and Safety Act*, the officers handled a total caseload of 1022 assignments, of which 84.4 percent were settled by the efforts of the officers. The officers handled a total of 827 grievances in the construction industry of which 93.1 percent were settled. Of 281 certification applications dealt with under the waiver of hearings programme, the officers were successful in 182 or 64.7 percent.

The Alternate Chairman of the Board supervises the activities of the field officers, and along with the Manager of Field Services and a Board Solicitor, meets with the officers on a monthly basis to deal with administrative matters and review Board jurisprudence affecting officers' activity and other policy and legal developments relevant to the officers' work.

(c) LEGAL SERVICES

Legal services to the Board are provided by the Solicitors' Office. This office consists of three Board solicitors, who report directly to the Chairman. The Board also employed four articling students to assist the solicitors in carrying out the functions of the Solicitors' Office.

The Solicitors' Office is responsible for providing the legal assistance required by the Board in all facets of its operations. The solicitors engage in legal research and provide legal advice to the Chairman, Vice-Chairman and Board Members in their day-to-day functions. They provide legal opinions to the Board and prepare memoranda relating to the wide variety of legal issues that arise during Board proceedings. The Solicitors' Office is responsible for preparing all of the Board's legal forms and other legal documents required for use by the Board. Board procedures, practices and policies are constantly reviewed by the solicitors. When preparation or revision of practice notes, Board Rules or forms become necessary, the solicitors are responsible for undertaking those tasks.

The solicitors are active in the staff development programme of the Board and a solicitor regularly meets with the Board's field staff to keep them advised of legislative, Board and judicial developments that may affect their day-to-day work. The solicitors are available for consultation by these officers on legal issues that may arise in the course of their work. At regularly scheduled field staff meetings, a solicitor prepares written material for distribution and discussion among the field staff relating to recent decisions of the Board or other tribunals which may affect the discharge of their duties. The solicitors also advise the Board Librarian on the legal research material requirements of the Board and on the library's general acquisition policy.

Another function of the Solicitors' Office is the representation of the Board's interest in court, when matters involving Board proceedings or Board orders become the subject of proceedings in court, as when an application for judicial review of a Board order is filed or an application is made by way of stated case to the Divisional Court. Where outside counsel is retained to represent the Board, a solicitor, in consultation with the Chairman, briefs and instructs such counsel on the Board's position in relation to the issues raised by the judicial proceedings. The Solicitors' Office is also responsible for the preparation and compilation of documents that the Board may be required to file with the court in relation to such proceedings.

The Solicitors' Office is responsible for all of the Board's publications. One of the Board's solicitors is the Editor of the Ontario Labour Relations Board Reports, a monthly series of selected Board decisions which commenced publication in 1944. This series is one of the oldest labour board reports in North America. In addition to reporting Board decisions, each issue of the Reports contains a section listing all of the matters disposed of by the Board in the month in question, including the bargaining unit descriptions, results of representation votes and manner of disposition.

The Solicitors' Office also issues a publication entitled "Monthly Highlights." This publication, which commenced in 1982, contains summaries of significant decisions of the Board issued during the month and other notices and administrative developments of interest to the labour relations community. This publication is sent free of charge to all subscribers to the Ontario Labour Relations Board Reports. The Solicitors' Office is also responsible for periodically revising the publication entitled "A Guide to the Labour Relations Act", which is an explanation in layman's terms, of the significants provisions of the Act. The latest revision took place in October, 1984, to reflect the amendments to the Act.

MEMBERS OF THE BOARD

At the end of the fiscal year 1984-85, the Board consisted of the following members:

JUDGE ROSALIE S. ABELLA *Chairman*

Judge Abella assumed office as chairman of the Board on September 19, 1984. After graduating from University of Toronto Law School in 1970, she practised law until her appointment in 1976 as a judge of the Ontario Provincial Court (Family Division). In addition to carrying out her judicial functions, Judge Abella's professional background includes: Member, Ontario Public Service Labour Relations Tribunal, 1975-76; Commissioner, Ontario Human Rights Commission, 1975-80; Member, Premier's Advisory Committee on Confederation, Ontario, 1977-82; Co-Chairman, University of Toronto Academic Discipline Tribunal, 1977-1984; Director, International Commission of Jurists (Canadian Section), 1982; Director, Canadian Institute for the Administration of Justice, 1983; and Chairman, Report on Access to Legal Services by the Disabled, 1983.

In 1983 Judge Abella was appointed as Sole Commissioner, Royal Commission on Equality in Employment. The report of this Commission was submitted to the federal Government in November of 1984.

IAN C.A. SPRINGATE *Alternate Chairman*

Mr. Springate had been a Vice-Chairman of the Board since May of 1976 before being appointed as the Board's Alternate Chairman in October of 1984. He has degrees of B.A. with distinction, (Sir George Williams, 1968), M.B.A. (McMaster University, 1970) and LL.B. (Osgoode, 1973). Having served his period of articles with the Ontario Labour Relations Board, Mr. Springate was subsequently called to the Bar with honours and practised law with a Toronto firm that specialized in labour law until his appointment as a Vice-Chairman. Mr. Springate taught in the M.B.A. programme at McMaster University as a part-time lecturer in industrial relations from 1973 to 1978. He is an experienced arbitrator. From February 1984 to January 1985, he served as Chairman of the Crown Employees Grievance Settlement Board.

LITA-ROSE BETCHERMAN *Vice-Chairman*

Dr. Betcherman was appointed as a part-time Vice-Chairman in January, 1985. She holds degrees of B.A. (1948, University of Toronto); M.A. (1961, Carlton University); and Ph.D. (1960, University of Toronto). For many years she has served the labour relations community as arbitrator, both interest and grievance, and has also acted as referee under the Ontario *Employment Standards Act*. From 1966 to 1972 she was Director of the Women's Bureau, Ontario Ministry of Labour. In 1972 she was appointed chairman of an inter-ministerial committee which prepared the Green Paper on Equal Opportunity Programs for Women in the Public Service. She has been a member of the Ontario Human Rights Commission, Ontario Press Council, Education Relations Commission, and the Judicial Council of Ontario. She is the author of two books which deal respectively with the history of fascism and communism in Canada in the interwar period.

E. NORRIS DAVIS *Vice-Chairman*

Mr. Davis, who holds the degree of LL.B. (Sask.) 1938, was first appointed to the Board as an employer representative in 1948. From 1952 to 1953 he served as the Chairman of the Board. In 1953 Mr. Davis left the Board and during the next 15 years held several positions in corporate personnel and industrial relations, including a number of years as President of Carling O'Keefe Breweries of Canada Limited. Mr. Davis returned to the Board as a part-time Vice-Chairman in 1977. Mr. Davis is an experienced arbitrator and referee under the *Employment Standards Act*.

RORY F. EGAN *Vice-Chairman*

Mr. Egan completed his undergraduate work at St. Michael's College, University of Toronto in 1938. After the intervening world war, Mr. Egan graduated from Osgoode Hall in 1945. Called to the Bar in the same year, he engaged in the practice of law, and served for one year as Assistant Crown Attorney in St. Thomas, Ontario. In 1954 he joined A.V. Roe as Legal Assistant to the Vice-President of Industrial Relations. Mr. Egan returned to private practice with a law firm specializing in labour relations law in 1959. In 1963 he left his law practice to devote his time to chairing boards of conciliation and arbitration. Mr. Egan was appointed a Vice-Chairman to the Ontario Labour Relations Board in 1966 and in 1974 was designated Alternate Chairman. He was appointed Chairman of the Ontario Police Arbitration Commission in 1976. Mr. Egan retired from his full time position at the Board in 1979 but continues to serve as a part-time vice-chairman.

D.E. (DON) FRANKS *Vice-Chairman*

Mr. Franks is a graduate of McMaster University (B.A. 1960) and Osgoode Hall Law School (LL.B. 1967). Joining the Board in 1969, he served as its Solicitor. In 1972 Mr. Franks was appointed a Vice-Chairman of the Board. He occupied this position until 1975 when he was appointed Vice-Chairman of the Construction Industry Review Panel, which position he held until May, 1980. Mr. Franks also served, during 1975-76, as the Commissioner on the Industrial Inquiry Commission into Bargaining Patterns in the Construction Industry in Ontario. The report prepared by him led to the amendment of *The Labour Relations Act* in 1977 which provided for province-wide bargaining in the construction industry. Mr. Franks was also involved in the implementation and monitoring of the province-wide bargaining scheme. In 1978 he was appointed chairman of a conciliation board by the government of Saskatchewan, which resolved a two-month province-wide strike by the Labourers' Union. Mr. Franks returned to the Labour Relations Board as a Vice-Chairman in May of 1980. He is presently an Adjunct Associate Professor in the Faculty of Engineering of the University of Waterloo, where he lectures in construction industry labour relations.

HARRY FREEDMAN *Vice-Chairman*

Mr. Freedman was appointed a Vice-Chairman of the Board in September, 1984. Having acquired the degrees of B.A. (University of Toronto, 1971) and LL.B. (Osgoode Hall Law School, 1975), Mr. Freedman was called to the Ontario bar in 1977. He practised labour law with a Toronto law firm until April, 1979, when he became the Ontario Labour Relations Board's Senior Solicitor. He held this position until his appointment as Vice-Chairman. Mr. Freedman has been associated with Ryerson Polytechnical Institute for several years as a lecturer in industrial relations, and taught a seminar course in grievance arbitration at Osgoode Hall Law School. He has authored several papers on labour relations practice in Ontario, and has been involved in organizing the labour law continuing education programme of the Law Society of Upper Canada. Mr. Freedman also sits as grievance arbitrator.

R.A. (RON) FURNESS *Vice-Chairman*

Mr. Furness graduated from Imperial College, University of London, with a degree of B.Sc. in Mining Geology in 1957 and worked as a geologist in Newfoundland, Quebec, Ontario and Manitoba until 1960. He obtained his LL.B. degree from Osgoode Hall Law School in 1961, was called to the Bar in 1963 and received his LL.M. from York University in 1968. Mr. Furness first joined the Labour Relations Board as its Solicitor in 1963. He was appointed a Vice-Chairman in 1969.

OWEN V. GRAY *Vice-Chairman*

Mr. Gray joined the Board as a Vice-Chairman in October, 1983. He is a graduate of Queen's University, Kingston, (B.Sc. Hons, 1971) and the University of Toronto, (LL.B. 1974). After his call to the Ontario Bar in 1976, Mr. Gray practised law with a Toronto law firm until his appointment to the Board.

ROBERT D. HOWE *Vice-Chairman*

Mr. Howe was appointed to the Board as a part-time Vice-Chairman in February, 1980 and became a full-time Vice-Chairman effective June 1, 1981. He graduated with a LL.B. (gold-medallist) from the Faculty of Law, University of Windsor in 1972 and was called to the Bar in 1974. From 1972 to 1977 he was a law professor at the Faculty of Law, University of Windsor. From 1977 until his appointment to the Board, he practised law as an associate of a Windsor law firm while continuing to teach on a part-time basis at the Faculty of Law as a special lecturer in labour law and labour arbitration. Mr. Howe is an experienced arbitrator, referee, fact-finder and mediator. During May-August, 1984, Mr. Howe served as Chairman of the Board in an acting capacity.

PAULA KNOPF *Vice-Chairman*

Mrs. Knopf joined the Board as a part-time Vice-Chairman in August, 1984. She graduated with a B.A. from the University of Toronto, 1972, and LL.B. from Osgoode Hall Law School, 1975. Upon her call to the Ontario bar in 1977, she practised law with a Toronto law firm briefly before commencing her own private practice with emphasis in the area of labour relations. A former member of the faculty of Osgoode Hall Law School, Mrs. Knopf is an experienced fact finder, mediator and arbitrator.

RICHARD (RICK) MacDOWELL *Vice-Chairman*

Mr. MacDowell's educational background includes a B.A. (Honours) in Economics from the University of Toronto (1969), a M.Sc. (with Distinction) in Economics from the London School of Economics & Political Science (1970) and a LL.B. from the University of Toronto Law School (1974). He has been associated with the University of Toronto as a lecturer in industrial relations with the Department of Political Economy since 1971 and with the Graduate School of Business since 1976. A former Senior Solicitor of the Board, Mr. MacDowell was appointed to his present position of Vice-Chairman in 1979. He is an experienced arbitrator and has served as a fact-finder in school board-teacher negotiations. Mr. MacDowell also has several publications relating to labour relations to his credit. During May-August, 1984, Mr. MacDowell served as the Board's Alternate Chairman in an acting capacity.

MORT. G. MITCHNICK *Vice-Chairman*

Mr. Mitchnick was appointed as Vice-Chairman of the Board in November, 1979. A native of Hamilton, Ontario, Mr. Mitchnick graduated with a B.A. from McMaster University in 1967 and completed his LL.B. at the University of Toronto Law School in 1970. After his call to the Bar in 1972, he engaged in the practice of labour law with a Toronto law firm until his appointment to the Board.

NORMAN B. SATTERFIELD *Vice-Chairman*

Mr. Satterfield joined the Labour Relations Board in October, 1975, as a part-time Board Member representing management. In January of 1978 he was appointed a Vice-Chairman. Mr. Satterfield holds a B. Comm. degree from the University of British Columbia (1949) and a diploma in Industrial Relations from Queen's University (1954). He has been involved in labour relations activities in the brewing, heavy manufacturing and construction industries for over 25 years. Mr. Satterfield is a past Director of the Construction Labour Relations Association of Ontario and a past Member of the National Relations Committee of the Canadian Manufacturers' Association.

SUSAN A. TACON *Vice-Chairman*

Ms. Tacon joined the Labour Relations Board as a Vice-Chairman in July, 1984. She holds a B.A. degree (1970) from York University and LL.B. (1976) and LL.M. (1978) degrees from Osgoode Hall Law School. At the time of her appointment to the Board she was employed as employee relations officer at York University and was also a part-time faculty member at Osgoode Hall Law School. Ms. Tacon has several publications, including a text and several articles in law journals.

Members Representative of Labour and Management

BROMLEY L. ARMSTRONG

A well-known civil rights leader, Mr. Armstrong was appointed a full-time Member of the Board representing labour in February of 1980. He has held various positions in unions, including local union representative, union steward, plant committee representative and financial secretary. Mr. Armstrong has actively participated in the activities of numerous ethnic and cultural associations, as founding member in many of them. He has been an executive member of the Canadian Civil Liberties Association since 1972 and was a member of the Advisory Council on Multiculturalism in Ontario from 1973 to 1975. Mr. Armstrong was appointed a Commissioner of the Ontario Human Rights Commission in 1975, which post he held until his appointment to the Board. Mr. Armstrong was honoured by the Government of Jamaica when he was appointed a Member of the Order of Distinction in the rank of officer, in the 1983 Independence Day Civil Honours List.

CLIVE A. BALLENTINE

A full-time Member of the Board representing labour since 1979, Mr. Ballentine has been a member of the Bricklayers Union (Local 2) since 1947. During that time he has held various offices in Local 2, including President from 1958 to 1959. In 1964 Mr. Ballentine was elected the Business Agent of Local 2, and in 1968 became the Business Representative of the Toronto Building and Construction Trades Council. In 1974 he assumed the post of Manager and Financial Secretary of the Council and held that position until his appointment to the Board. Mr. Ballentine is also a past executive Member of the Labour Council of Metropolitan Toronto and was its

Vice-President between 1975 and 1977. He has served on the Ontario Construction Industry Review Panel and the Ontario Premier's Advisory Committee for an Economic Future.

JOHN D. BELL

Mr. Bell has been a full-time Member of the Board representing management since 1970. He was employed for 33 years at Massey-Ferguson Limited in various personnel and industrial relations capacities prior to his appointment to the Board. The last position he held at the Company was Director of Personnel and Industrial Relations, Industrial and Construction Machinery Division. Mr. Bell retired as a full-time Board Member in August, 1982 and was subsequently re-appointed as part-time Board Member.

DONALD H. BLAIR

Mr. Blair was appointed as a part-time member of the Board representing management in March, 1983. Mr. Blair retired from Dominion stores after 31 years of service, the last 15 years as Director of Labour Relations. In May of 1983, Mr. Blair established a firm specializing in providing industrial relations consulting services. He has been a member of the Personnel Association of Toronto since 1960 and was a Director of the same during 1965-67. He was also Vice-Chairman of the Board of Directors of the Central Ontario Industrial Relations Institute from 1979 to 1983.

FRANK C. BURNET

On December, 1983, Mr. Burnet was appointed a part-time Board Member representing management. After graduating from the University of Saskatchewan (B.A. Economics, 1940) Mr. Burnet was engaged in personnel capacities in several corporations in Ontario and Quebec. In 1970 he joined Inco Ltd., as its Director of Industrial Relations responsible for all Canadian Operations. From 1972 until his retirement in 1982, Mr. Burnet held the position of Vice-President Employee Relations, responsible for employee relations activities in Canada, U.S., U.K., and other foreign operations. The many offices Mr. Burnet has held include: Chairman, National Industrial Relations Committee of the Canadian Manufacturers' Association, 1978-81; Governor and Member of the Executive Committee of the Canadian Centre for Occupational Health and Safety, 1982-83; Member of OECD Joint Labour-Management team studying technological change in the U.S. (1963) and incomes policy in the U.K. and Sweden, (1965).

LEONARD C. COLLINS

Mr. Collins was appointed a part-time Member of the Board representing labour in November, 1982. Prior to joining the Board Mr. Collins had been very active in the trade union movement in Ontario. From 1945 to 1960 he held various positions with Local 232 of the United Rubber Workers, including the positions of Vice-President from 1950 to 1954 and President from 1954 to 1960. In 1960 he was appointed International Field Representative for the United Rubber Workers and later served as acting Director of District 6.

WILLIAM A. CORRELL

A graduate of McMaster University (B.A. 1949), Mr. Correll was appointed in January, 1985, as a part-time Board Member representing management. He joined the Board with an impressive background in the personnel field. Having held responsible personnel positions at Stelco, Atomic Energy of Canada Limited and DeHavilland Aircraft of Canada Limited for a number of years, Mr. Correll joined Inco Limited in 1971. After serving as that company's Assistant Vice-President and Director of Industrial Relations, in 1977 Mr. Correll became Vice-President of Inco Metals Company. He has lectured on personnel and management subjects at community college and university level and has conducted seminars for various management groups. He is active as management representative on boards of arbitration and on various management organizations.

MICHAEL EAYRS

Mr. Eayrs was appointed a part-time Board Member representing management in 1979. Mr. Eayrs has had a long career in personnel and industrial relations with companies in British Columbia, Quebec and Ontario, and the West Indies. The positions he has held include: Director of Labour Relations of the Ontario Federation of Construction Associations; Executive Secretary of the Joint Labour-Management Construction Industry Review Panel; Director of Industrial Relations, Kaiser Canada; Manager of Industrial Relations of the SNC Group; and Executive Director of the Construction Employers Co-ordinating Council of Ontario. Mr. Eayrs is a past Chairman of the National Labour Relations Committee of the Canadian Construction Association, and is presently a vice-chairman of the Joint Labour-Management Construction Industry Advisory Board. He is presently an Adjunct Associate Professor in the Faculty of Engineering of the University of Waterloo, where he lectures in construction industry labour relations.

ROBERT J. GALLIVAN

In January, 1985, Mr. Gallivan was appointed a part-time Board Member representing management. After holding several responsible personnel positions with C.I.L. Inc., Mr. Gallivan became that company's National Employee Relations Manager in 1970 and held this position for 13 years. For many years, he has been an active member of various management organizations, including the Canadian Chamber of Commerce and the Canadian Manufacturers' Association. Mr. Gallivan continues to serve as management representative on various government boards and commissions on a part-time basis.

ANDREW GRANT

Mr. Grant was appointed a part-time Board Member representing management in April, 1983. After a period of employment at Gulf Canada, Mr. Grant joined B.P. Canada in 1960. Mr. Grant has held offices in various committees including the National Board of Directors of the Packaging Association of Canada; Chairman, Industry Committee on Metric Conversion and Corporate Representative and Chairman of the Joint Canadian/U.S. Technical Committee of the Packaging Institute, U.S.A.

PAT V. GRASSO

Appointed a part-time member of the Board representing labour in December, 1982, Mr. Grasso has been active in the labour movement in Ontario for many years. Having held various offices in District 50 of the United Mine Workers of America, he was appointed Staff Representative in 1958, and Assistant to the Regional Director for Ontario in 1965. In 1969, Mr. Grasso became the Regional Director for Ontario and was elected to the International Executive Board. When District 50 merged with the United Steelworkers of America in 1972, he became Staff Representative of the Steelworkers in charge of organizing in the Toronto area. In January 1982, Mr. Grasso was transferred to the District 6 office of the Steelworkers and appointed District Representative in charge of co-ordinating, organizing and special projects.

ANNE S. GRIBBEN

Ms. Gribben, a registered nurse by profession, obtained a B.A. from the University of Toronto in 1968, in addition to her nursing qualification. Her nursing career at the Toronto Western Hospital included 13 years served in a supervisory capacity. She has served on various committees of both the Canadian Nurses' Association and the Registered Nurses' Association since 1950. An Executive Officer of the former District No. 5, Registered Nurses' Association of Ontario from 1960, during 1964-65 she was involved in its re-organization into the present-day Metro Toronto Chapter. Ms. Gribben joined the Employment Relations Department of the Registered Nurses' Association of Ontario in 1965, and became its Director in 1968. Ms. Gribben relinquished that post in 1974 to become the Chief Executive Officer of the Ontario Nurses' Association. She was appointed a part-time Board Member representing labour in 1975 – the first woman to be appointed as a Board Member of the Ontario Labour Relations Board.

JOSEPH KENNEDY

In May, 1983, Mr. Kennedy was appointed a part-time Board Member representing labour. He has been a member of Local 793 of the International Union of Operating Engineers for over 30 years and has held various offices in that Local. At present he holds the position of Business Manager of Local 793.

HANK KOBRYN

A member of the Iron Workers' Union since 1948, Mr. Kobryn was the President of Local 700 of that union from 1951 to 1953. Thereafter, for 16 years, Mr. Kobryn held the post of Business Agent of the Iron Workers' Local 700 in Windsor. Among the many other offices Mr. Kobryn has held are: Vice-President of the Provincial Building and Construction Trades Council of Ontario 1958-62; Secretary Treasurer of the same council, 1962; Member of the Labour-Management Provincial Safety Committee; Member of the Labour-Management Arbitration Commission; Member of the Construction Industry Review Panel; and Member of the Advisory Council on Occupational Health and Safety. In December, 1980, Mr. Kobryn was appointed a full-time Board Member representing labour.

LOUIS LENKINSKI

On August of 1984, Mr. Lenkinski was appointed a part-time Board Member representing labour. A member of the Upholsterers' International Union for many years, he served as business representative of that union from 1958 to 1969. Since 1969, he has held the positions of Project Director and Executive Secretary to the Labour Council of Metropolitan Toronto. In 1975 he became Executive Assistant to the Ontario Federation of Labour. Mr. Lenkinski has frequently served as labour representative on arbitration and conciliation boards and has also represented parties in proceedings before the Labour Relations Board.

ROBERT D. McMURDO

Since April of 1984, Mr. McMurdo has served as a part-time Board Member representing management. An honours graduate in business administration (1953) from University of Western

Ontario, Mr. McMurdo has held many industry related offices including: President of the London & District Construction Association, President of the Construction Safety Association of Ontario and President of the Ontario General Contractors Association. He is the President of McKay-Cocker Construction Limited and McKay-Cocker Structures Limited of London and is currently a member of the Ministry of Labour Construction Industry Advisory Board.

F. WILLIAM MURRAY

Mr. Murray was a part-time Member of the Board representing management from 1965 to February of 1980, when he assumed a full-time position on the Board. From 1948 to 1963, Mr. Murray was employed as the Manager of the Motor Transport Industrial Relations Bureau, which served as the labour relations representative for groups of companies in Ontario and Quebec. In 1963 he formed his own industrial relations consulting firm and was active in industrial relations consulting work for many trucking firms and related industries. Since 1971 Mr. Murray has been a Member of the Public Service Staff Relations Board. He is also a Member of the Board of Trade Industrial Relations Committee and the Personnel Association of Toronto.

JOHN W. MURRAY

In August of 1981, Mr. Murray was appointed as a part-time member of the Board representing management. Mr. Murray earned a B.A. degree in Maths and Physics as well as a M.A. degree from the University of Western Ontario. Having served as a Lieutenant with the Royal Canadian Navy during the Second World War, he commenced a career in sales in 1946. He joined the Purchasing Department of John Labatt Ltd. in 1956, becoming Director of Purchasing in 1957. He subsequently held a number of Senior Management positions in the Labatt Group of companies in several parts of the country. He was a vice-president of Labatt Brewing Company for several years before his retirement in January 1982.

SEAN O'FLYNN

Upon emigrating to Canada in 1967, Mr. O'Flynn became the co-ordinator of Niagara College in Welland and helped to formulate a credit programme in labour studies, one of Ontario's first such programmes. Since 1974 Mr. O'Flynn held several key positions with the Ontario Public Service Employees Union. He was president of that union until November 1984, when he chose not to seek re-election. Mr. O'Flynn has been very active on behalf of the trade union movement in Ontario and since 1984 has been a Vice-President of the Ontario Federation of Labour. His academic qualifications include: Dip. Econ. Pol. Science (Oxford University, England), B.Sc. (Econ.) (University of Wales) and M.Ed. (New York University, Buffalo, N.Y.). He was appointed a full-time Board Member representing labour in January, 1985.

PATRICK J. O'KEEFFE

Mr. O'Keeffe has been a labour representative Member of the Board since 1966 and presently he serves in that capacity on a part-time basis. A long time union activist, he participated in the trade union movement in Britain and Australia prior to his arrival in Canada. In Canada, Mr. O'Keeffe was a member of the United Steelworkers of America and the Canadian Union of Public Employees. He has held positions of steward, secretary and president of various local unions. He is a past National Representative of C.U.P.E. and presently holds the office of Ontario Regional Director of C.U.P.E., and is also a Vice-President of the Ontario Federation of Labour.

ROSS W. PIRRIE

Mr. Pirrie was appointed a part-time Board Member representing management in January, 1985. Having been employed by Canadian National Railways for ten years, in 1960 he joined Shell Canada Limited. At Shell Canada, Mr. Pirrie held a wide range of managerial positions in general management, occupational health, human resources and industrial relations before retiring in 1984. Mr. Pirrie holds the degree of B.A. (Psychology) from the University of Toronto.

KENNETH V. ROGERS

Mr. Rogers was appointed in August, 1984, as a part-time Board Member representing labour. From 1967-1976, he was a representative with the International Chemical Workers Union and served as Secretary-Treasurer of the Canadian Chemical Workers Union during 1976-1980. Since the Energy and Chemical Workers Union was founded in 1980, Mr. Rogers has been its Ontario Co-Ordinator. He is a former Vice-President of the Ontario Federation of Labour.

JAMES A. RONSON

Mr. Ronson was appointed a full-time Member of the Board representing management in August of 1979. He graduated from the University of Toronto with a B.A.Sc. in 1965 and a LL.B. in 1968. After his call to the Bar, Mr. Ronson practised law in Toronto. During his practice he served on numerous boards of arbitration as employer nominee.

MICHAEL A. ROSS

Mr. Ross was appointed as a part-time Board Member on the labour side in February, 1980. Mr. Ross, who has studied economics and political science at Laurentian University, has been the Business Manager of the Labourers' International Union of North America, Local 493 for the past 12 years. He has held the position of Secretary of the Sudbury and District Building & Construction Trades Council for four years and has been President of the Council for two years. He is presently serving his second four-year term as Vice-President of the Ontario District Council of the Labourers' Union and is in his second year as a Director on the Board of the Sudbury Regional Development Corporation.

WILLIAM F. RUTHERFORD

Mr. Rutherford has been a full-time Member of the Board representing labour for seven years. He was the Houdaille Plant Chairman for the UAW for 37 years. He was a Member of the Oshawa District Labour Council between 1944 and 1977 and a Member of the Canadian UAW Council during 1948 and 1971. Mr. Rutherford has served on the Board of Referees of the Unemployment Insurance Commission for 12 years.

INGE M. STAMP

Appointed a full-time Board Member representing management in August, 1982, Ms. Stamp comes to the Board with many years of experience in the personnel and labour relations field at Bechtel Canada Limited. Having joined that firm as Senior Secretary to the Vice-President of Labour Relations in 1969, Ms. Stamp became Administrative Assistant in 1974 and Labour Relations Assistant in 1975. In 1977 she was appointed labour relations representative, a post she held prior to her appointment to the Board. In this capacity, Ms. Stamp was appointed, by the Industrial Contractors Association of Canada, as a member of several employer bargaining agencies designated to negotiate collective agreements on behalf of management. Ms. Stamp has been very active in the functions of the Industrial Contractors Association of Canada and since 1979 has served as treasurer responsible for the General Funds and the Ontario Industry Funds.

ROBERT J. SWENOR

Mr. Swenor was appointed as a part-time Board Member in February, 1982, to represent management. Mr. Swenor, who holds the degrees of B.A. and M.B.A. from McMaster University and a certificate in Metallurgy of Iron and Steel, has been employed with Dominion Foundries and Steel Ltd., Hamilton, since 1970 and is presently its Assistant Secretary. He is Vice-Chairman of the Canadian Manufacturers' Association Legal Advisory Committee on Environmental Law and also serves on the Legislation Committee, the Sub-Committee on Corporation Law and the Environment Quality Committee of that organization.

E.G. (TED) THEOBALD

Mr. Theobald was appointed as a part-time Board Member representing labour in December, 1982. From 1976 to June, 1982, he was an elected member of the Board of Directors of O.P.S.E.U., and during this period served a term as Vice-President. Active in the trade union movement since 1971, Mr. Theobald has served as President and Chief Steward of a 600 member local union. He has served on numerous union committees and has either drafted or directly contributed to several labour relations related reports. He is experienced in the grievance procedure and arbitration.

W.H. (BILL) WIGHTMAN

Mr. Wightman was first appointed to the Board 1968, becoming a full-time member in 1977, and resigning from the Board in April 1979, in order to serve as a member of the 31st Parliament of Canada and Parliamentary Secretary to the Minister of Labour. He was re-appointed as a full-time Board Member representing management in May, 1981. Following 12 years as an industrial relations specialist in the petro-chemical, food processing and health care industries in the U.S. and Canada, he became Director of Industrial Relations for the Canadian Manufacturers' Association from 1966 to 1977. Concurrently he served as the Canadian Employer Delegate and Technical Advisor to the International Labour Organization in Geneva and the Organization for Economic Co-operation and Development in Paris, and as a member of the Canadian Manpower and Immigration Council, the Unemployment Insurance Advisory Committee and the Attorney-General's Committee on Prison Industries. He was a founding member of the McMaster Medical Centre Advisory Council on Occupational Health and Safety. His writing credits include papers presented at the World Employment Conference in Geneva and symposia at Vienna and Panama City. He is a graduate of Clarkson College (BBA'50) and Columbia University (MS'54) where he lectured while engaged in doctoral studies.

JAMES P. WILSON

For a number of years Mr. Wilson was the Director of Operations for a multi-trade contractor in the construction industry. Prior to joining the Board he served as the Labour Relations Consultant to the Electrical Contractors Association of Ontario for 10 years. Mr. Wilson has served as the

President of the Electrical Contractors Association of Ontario, Charter Member of the Canadian Electrical Contractors Association, a Director of the Toronto Construction Association, Vice-President of the Ontario Federation of Construction Associations and Director of the Toronto Electrical Club. In January of 1981, Mr. Wilson was appointed as a full-time Board Member representing management.

NORMAN A. WILSON

Mr. Wilson was appointed a part-time Board Member representing labour in 1979. A member of Local 721 of the Iron Workers since 1949, he became its Business Agent in 1955. Later, in 1958, he was appointed General Organizer for the International Union, covering Quebec and the Maritime Provinces. Eventually this assignment was enlarged to include the western provinces and Ontario. In 1968, Mr. Wilson became the Executive Director of the Canadian Operations of the Union. Mr. Wilson has been an active participant in a number of Provincial Building Trade Councils. He participated in the formation of, and later became a member of, the Construction Industry Review Panel of Ontario and has acted as Co-Chairman of that Panel.

ROGER WILSON

Mr. Wilson was appointed a part-time Board Member representing labour in August, 1984. Mr. Wilson has had a long association with the United Steelworkers of America, becoming the first Vice-President of Local 14863 in 1974 and its President in 1978. Since 1982, he has held the position of Chief Steward of Local 8562 of the Steelworkers. He is a former counsellor and Deputy Reeve of the Township of Hope.

V HIGHLIGHTS OF BOARD DECISIONS

Arbitrary, discriminatory or bad faith refusal of access to hiring hall records breach of s. 69

In this complaint four members of the respondent union alleged it had contravened s. 69 of the Act by, inter alia, refusing them access to hiring all records, which they had sought to determine whether, as they thought, job referrals by the union's hiring hall were being made unfairly. On a motion to dismiss for failure to disclose a prima facie case, counsel for the respondent argued that s. 69 addresses only acts or omissions of a trade union in the actual selecting, referring, assigning, designating or scheduling of persons to employment and that a denial of access to hiring hall records could not breach s. 69 even if the denial was arbitrary, discriminatory or in bad faith. The Board reviewed the language of s. 69, as well as the context in which it was enacted. It held that the words "engaged in the selection, referral ... [etc.] ... of persons to employment" describe the unions to which the section applies; they do not modify or limit the word "act" in the phrase "shall not act in a manner that is arbitrary, discriminatory or in bad faith." From the context of the section's enactment, the Board concluded that the actions with which the later phrase is concerned are actions to which the duty of fair representation in s. 68 is directed, i.e. actions in matters affecting employment of persons represented by the union.

On the basis of the foregoing, the Board concluded that a refusal of information will be a violation of s. 69 if the refusal is arbitrary, discriminatory or in bad faith. The Board stated that, *prima facie*, persons seeking referral have an interest in knowing about job referrals made and the basis on which they are made. Whether a refusal of such information constitutes a breach of s. 69 will require a balancing of the individual's interest with the individual and collective interests of others for whom the union seeks employment. It is for the complainant to establish on the facts of any particular case, that the union has acted in an arbitrary, discriminatory or bad faith manner in striking this balance.

The Board held it would hear the complaint on its merits upon the complainants filing further particulars of other allegations in its complaint. *Maurice Berlinguette et al., re Labourers Union, Local 1036*, [1984] OLRB Rep. April 586.

Parties incorporating by reference terms of other collective agreement not entitled to grieve under that agreement

This was a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*. The referral raised the issue of whether the applicant, Local 1059 of the Labourers' International Union had jurisdiction to bring the grievance against the respondent employer. The preliminary issue was whether Local 1059 was bound to a collective agreement with the respondent which would give the Board jurisdiction to hear the grievance.

There was no signed agreement between the applicant and the respondent. The uncontested evidence of the respondent indicated that the only collective agreement it had signed with any local of the Labourers' Union was with Local 1089 in Sarnia. Local 1059 contended that this agreement bound the respondent to the provincial civil engineering collective agreement composed of several collective agreements between named employers and the Ontario Provincial District Council of the Labourers' Union on behalf of its affiliated locals, which included Locals 1059 and 1089.

The Board analysed the applicant's claim that two clauses of the collective agreement between Local 1089 and the respondent bound the latter to the civil engineering agreement. In particular, clause 5.3 of the agreement provided for the employer abiding by wage rates and conditions of agreements that exist in other areas of the Province between a contractor or contractors' association and Local 1089. The civil engineering agreement provided in article 2.03 that each local union is the administrative party for the agreement for work performed within the specified geographic area of such Local, including the filing of grievances under section 124 of the Act. Local 1059 was the administrative party in the geographic area, which was the area where the respondent was performing the work at issue. Therefore, Local 1059 had jurisdiction to bring the grievance, union counsel argued.

The Board indicated that given article 5.3 of the agreement between Local 1089 and the respondent, for Local 1059 to succeed in the present case, there must exist an agreement between a contractor or contractors' association and Local 1089 in the relevant geographical area. The Board was satisfied that the civil engineering agreement, while binding on Local 1089 with respect to each employer who has signed it, was not binding on Local 1089 in the relevant geographical area. As such, Local 1059 had no access to section 124 of the Act with respect to the respondent.

The Board noted that the result would have been no different even if the Board interpreted the agreement between Local 1089 and the respondent as creating an obligation for the respondent to apply the terms of the civil engineering agreement in the relevant geographical area. The respondent had agreed to abide by wage rates and conditions of whatever agreements apply. This only suggests incorporation by reference of the terms in other collective agreements. Had the parties desired the respondent to be bound by some other agreement between Local 1089 and a contractor or contractors' association, the parties would have expressed that intent more clearly. Therefore, the Board was of the view that Local 1089, as the union party to the collective agreement, would be the party to enforce its provisions. This is particularly so given the wording of section 124 of the Act which refers to grievances being brought by a party to a collective agreement. *Sandercock Construction (1976) Ltd.*, [1984] OLRB Rep. April 653.

Employer directed to produce payroll records

In this ongoing bargaining complaint, an officer of the respondent employer was served with a summons requiring him to produce payroll and benefit records of the company for the period commencing just prior to the ongoing strike and continuing to date. The employer objected to the summons, arguing that the union was engaging in a "fishing expedition" and an abuse of process, and that the information in the documents was irrelevant and, in any event, "confidential".

The Board found that the documents were relevant to the particular issues which had been raised in the complaint. On the issue of "confidentiality", the Board concluded that the employer was using the term loosely to indicate that the documents were personal and not public. It was not claiming any statutory or common law privilege. While putting some limitation on the scope of the records, the Board ruled that the documents sought were "produceable" pursuant to the subpoena. Counsel for the complainant then sought an order requiring, in effect, that the documents in question be forthwith produced to him for his inspection prior to any attempt to introduce them into evidence.

The Board held that it had the power to make such an order in appropriate circumstances, and would do so in this case. The Board noted, however, that a party who seeks and obtains such an order impliedly undertakes to the Board, and to the person from whom production is compelled, that the documents and information in them will not be used for purposes collateral or ulterior to the proceedings in which the order is made. Breach of such an undertaking, the Board noted, could be the subject of contempt proceedings.

The Board held that it can require production during an adjournment of the Board's hearings. In the circumstances of the case, the Board's order set out formal requirements for deposit of the documents in question with the Registrar, and for inspection of the documents at the Boards premises; these requirements would apply if the parties were unable to agree on more informal arrangements. *Shaw-Almex Industries Limited* [1984] OLRB Rep. April 659.

Board holds union owed duty of fair representation to part-time employee

A part-time employee alleged a contravention, inter alia, of the duty of fair representation by the union, during the negotiations for a collective agreement and by refusing to file a grievance on his behalf when he was terminated by the employer from his part-time position. The union and the employer took the position that the union had no representation rights with respect to part-time employees and that therefore no duty of fair representation was owed to the complainant. While the respondents relied on provisions of the collective agreement to support their position, they went on to submit that any ambiguity in the collective agreement should be resolved in their favour because they were in agreement that part-timers were never intended to be represented by the union.

The Board stated that where both employer and union agree that there was no intention to recognize the union for a group of employees, the Board would require compelling evidence to reach a contrary conclusion. On the other hand, a s. 68 complaint cannot fail simply because the union and the employer, (both of whom may be affected by a finding of violation) deny any intention to extend representation to such group. The intention must be gathered from the recognition clause in the applicable collective agreement. Where the clause is ambiguous, the parties' intentions must be inferred from the entire agreement and if still left in doubt, by examining the conduct of the parties.

Examining the collective agreement between the respondents, the Board found nothing in the recognition clause excluding part-timers. Nor could the Board find any provision in the balance of the agreement which had the effect of amending the scope of the recognition clause. While most of the provisions relating to part-timers were designed to protect the full-time employees represented by the union, the requirement that part-timers receive the same minimum wage rate as regular employees and the provision for the check-off of union dues from part-timers, were seen by the Board as negotiating for part-timers by the union and being renumerated for so doing. In agreeing to these provisions the employer gave recognition to the union for part-timers. The Board noted that the Canada Labour Relations Board had, prior to the negotiation of the instant collective agreement, held that a duty of fair representation was owed by the respondent union to a part-time employee, where the collective agreement in question was identical in all essential respects. The instant collective agreement was entered into subsequently, leaving the key contentious provisions unchanged, even though the parties had full knowledge of the interpretation placed upon it by the Canada Labour Relations Board. Therefore, even if the Board were to conclude that the collective agreement left the matter in doubt, from an examination of the conduct of the parties, the Board must conclude that the parties accepted that the union was entitled to represent part-timers as a part of the bargaining unit. That being so, the duty of fair representation also attached.

Turning to the merits, the Board found that the union had failed in its duty under s. 68 by failing to consult the complainant during negotiations. *Consolidated Fastfrate Limited, re Endel Vesik and Teamsters, Local 938*, [1984] OLRB Rep. May 691.

"Carve out" unnecessary to remedy unfair representation of technical employees

A group of technical and professional employees of the City of Thunder Bay had filed a complainant alleging unfair representation by CUPE, Local 87. They formed an association and in an application for certification, sought a "carve out" from the CUPE unit. In a previous decisions the Board dealt with the unfair labour practice complaint only, and found that Local 87 had contravened s. 68. (See *Monthly Highlights*, June 1983) On the question of appropriate remedy, the Board pointed out that the separation of technical and professional employees goes against Board policy as to bargaining unit configuration and expressed its concerns as to the viability of the unit, the jeopardy to job mobility and the adverse effects on industrial stability. Therefore, the Board concluded that the dismantling of the bargaining unit should be a last resort to be adopted only if the Board was satisfied that the failure of representation could not be remedied by some less drastic form of redress.

On the evidence, the Board concluded that such a drastic step was unnecessary, and that the interest of the complainants could be adequately redressed by a remedial order under s. 89. The Board noted that the unlawful conduct, i.e. misrepresentation and removal from the commitee had not resulted in any actual loss to the complainants, and that the individuals responsible for the violation were no longer in office. Over the objection of the complainants, the Board admitted evidence that subsequent to the finding of the breach, the union had taken some steps at negotiations to remedy the situation. The request for the return of union dues paid and for costs were also denied.

The Board noted that mistrust and absence of accountability in the negotiation and ratification process were at the root of the problem and that the remedy must be fashioned to correct that situation. Accordingly the Board directed the establishment, on a permanent basis, of a system of proportional representation in the bargaining structure. The bargaining committee was to comprise of five members separately elected from the different levels in the wage grid. This will provide input from the full range of the unit employees in the formulation of bargaining objectives. A posting was also directed. *Thunder Bay, Corporation of the City of*, [1984] OLRB Rep. May 759.

Retail food store opened in premises of closed Dominion Store – not sale of business

Dominion Stores operated a retail store in leased premises in a small suburban shopping plaza. The lease had a long term, and its terms were becoming increasingly uneconomic to the landlord. The landlord sought Dominion's surrender of this lease, and when Dominion agreed, the landlord leased the premises to the respondent, which already operated two other retail food stores catering to the "Italian market". The surrender was not contingent on the respondent entering into a lease. The respondent's agreement to lease was not contingent on its obtaining anything from Dominion, and there was no contract between the respondent and Dominion until the latter offered some store equipment for sale, which was well after the respective commitments to surrender and lease had been made. The respondent only became aware that Dominion was selling equipment after the sale had begun and some equipment sold. The respondent bought the remaining unsold equipment for $56,000, about 15% of its total cost of opening its new store in Dominion's old location. The applicant union sought a declaration that there had been a sale of part of Dominion's business.

The Board concluded that the landlord was not an intermediary in a sale of Dominion's business to the respondent. While the coincidence of location and similarity of operation favoured a finding of sale when seen in isolation, the independence of the three transactions, i.e.: Dominion's surrender of the lease, the respondent's acquisition of a new lease, and the equipment purchase, point to the contrary. The hiatus of 4½ months during which the premises remained vacant, the existence and similarity of the respondent's pre-existing operation and the fact that the management and key personnel for the new store all came from respondent's existing operations, all weighed against a finding of a sale. On balance the Board concluded that what had occurred was an expansion of a parallel business in which some assets of Dominion came to be used. The request for a declaration of sale was denied. *Valencia Foods*, [1984] OLRB Rep. May 733.

Timely referral for expedited arbitration available regardless of prior initiation of contractual arbitration by other party

This was a reference under s. 107(1) of the Act by the Minister to the Board, of a question relating to his authority under s. 45 to appoint an arbitrator. The facts were as follows: The union had filed a grievance on behalf of a discharged employee and the grievance procedure was exhausted. Under the terms of the collective agreement, each of the parties had seven days to refer the matter to arbitration. The union acted first by appointing its nominee to a tripartite Arbitration Board contemplated by the collective agreement. Subsequent to receiving notice of the appointment of the union's nominee, but *before* the expiry of the seven day period prescribed in the collective agreement for referral of grievances to arbitration, the employer requested the minister to appoint an arbitrator under s. 45. The union, relying upon the Divisional Court decision in *Royal York Hotel*, argued that when it embarked upon the arbitration route prescribed in the agreement by appointing its nominee, it automatically foreclosed the availability of a single arbitrator under s. 45.

The Board reviewed the court decision in *Royal York Hotel*, and concluded that the only issue before the court was the timeliness of the s. 45 referral. The issue of whether the prior initiation of the contractual arbitration process could foreclose a timely resort to the statutory alternative was not in issue before the court. Reviewing the underlying structure and purpose of s. 45, the Board was of the view that the legislature did not envisage a "foot race" wherein the party who makes the first reference to arbitration can control the form of the arbitration mechanism – particularly if it involves a pre-emption of the statutorily designated alternative. The opening words of s. 45, "Notwithstanding the arbitration provision in the collective agreement", together with the exclusive jurisdiction accorded to the s. 45 arbitrator suggested the opposite conclusion. The Board concluded that the plain words of the statute suggest that a timely s. 45 referral is available regardless of the arbitration procedure in the collective agreement.

Consequently, the Board was of the opinion that the employer's referral was timely under

s. 45(2) and that the minister had jurisdiction to appoint an arbitrator under s. 45. *City of Mississauga (Transit Department)*, [1984] OLRB Rep. June 844.

Extent of employee obligation to produce company documents under summons

The union filed an application under section 93 of the *Labour Relations Act* alleging that the respondent employer had engaged in an unlawful lockout through the contracting out of bargaining unit work and the laying-off of bargaining unit employees.

One of the co-owners of the respondent nursing home testified that the impugned conduct was motivated by the employer's deteriorating financial situation. The initial hearing concluded without the co-owner's cross-examination having been completed. Following that hearing, the applicant requested, and the Board issued, a subpoena directing the employer to produce certain financial and business documents relating to the matters the respondent had asserted at the hearing. The respondent refused to produce the documents requested, in particular the audited financial reports of the company.

The union argued that since the respondent has put its financial position in issue as the purported reason for its conduct, the union was entitled to test such assertion in cross-examination and to require the production of such financial records as might confirm or contradict the witnesses' oral evidence. The respondent contended that its records were confidential and that a private company should not have to make public its annual financial statements.

Observing that the documents in question were not privileged in a legal sense, the Board outlined the public policy considerations that underlie the practice of disclosure. The Board accepted the view that complete disclosure is an aid to discovering the truth so that justice can be done as between the parties. The Board did caution, however, that any disclosure involves a concomitant implied undertaking on the part of the party to whom documents are produced, not to use the documents for a collateral or ulterior purpose. The Board also noted that the respondent's concern for confidentiality could also be addressed through section 9(1)(b) of the *Statutory Powers Procedure Act* dealing with *in camera* hearings. In the result, the Board ordered production of the documents. *Gordon-Nelson Development Company Limited*, [1984] OLRB Rep. June 807.

Referral to expedited arbitration made after expiry of period stipulated in collective agreement untimely

This was a reference to the Board by the Minister, of a question relating to his authority to appoint an arbitrator under s. 45 of the Act. The employer had made the referral to the Minister two days after the time period stipulated in the collective agreement for referring grievances to arbitration had expired.

Reviewing the purpose behind the expedited arbitration provision of the Act and in light of the Court decision in *Royal York Hotel*, the Board concluded that the time restrictions in s. 45 must be strictly construed. In view of the facts before it, the Board held that the referral under s. 45 in question was untimely and that the Minister had no authority to appoint an arbitrator under that section. *St. Raphael's Nursing Home (Kitchener)*, [1984] OLRB Rep. June 859.

No objective justification for exemption of senior employees from load capacity restrictions – s. 68 breached

The complainant, a truck driver engaged as a dependent contractor, alleged that the union had contravened s. 69 of the Act by renegotiating the no lay-off clause of the collective agreement in a manner that protected a core group of sixteen drivers from lay-off, but required other drivers with less seniority to be laid-off when the average number of loads per day consistently fell below five. The actions complained of were the latest development in a long process of declining workloads and attrition of the bargaining unit. The previous collective agreement contained a "no lay-off" clause. At the time it was entered into, the bargaining unit consisted of only the sixteen drivers in that core group. The clause made no allowance for lay-off of drivers subsequently recalled. The complainant was recalled during a brief upturn in business but, as a result of the no lay-off clause, could not be laid-off when business declined. However, he was immediately laid-off when the new collective agreement containing the aforementioned revision came into effect. It was also alleged that the union had breached its duty of fair representation by negotiating a clause to provide for eventual standardization of truck size among drivers, the transitional provisions of which allowed only members of the core group to load their oversize trucks to capacity.

The Board reviewed its decision in *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35, and reaffirmed the principle that where a union's decision to renegotiate job security provisions of a collective agreement has the effect of transferring employment advantages from a minority to the majority of the bargaining unit, the union must show some objective justification for the action beyond the mere will of the majority. The Board concluded that the amendment of the no lay-off clause was part of a reasonable response to the problem faced by the union in attempting to secure sufficient work for its members to enable them to meet their own costs and survive an economic downturn. The union had shown objective justification for its decision to negotiate that modified no lay-off provision, and as the decision had also been arrived at in a procedurally fair manner, the amendment of the "no lay-off" clause was neither arbitrary, discriminatory, nor undertaken in bad faith.

The Board concluded that the clause providing for standardization of truck size was also objectively justified. The amendment was meant to reduce friction between owners of large and small trucks within the unit by removing the source of the friction, i.e. the differing economic impact of recession on large and small operators. The negotiation of that provision did not therefore breach the union's duty under s. 68. The Board decided, however, that the provision exempting only core group drivers from load limitations on existing oversize trucks discriminated against other drivers such as the complainant, without any objective justification. The union had therefore contravened s. 68 by negotiating it into the agreement. *Felix Charles et al.* [1984] OLRB Rep. July 908.

Contracting out of core activity held to be unlawful

This complaint arose out of the decision of Kennedy Lodge to contract out its nursing care functions to Medox Health Care Services. The proposed contracting out would have resulted in the termination of 92 employees represented by the complainant union, and covered by a collective agreement. The union argued that the decision to contract out was motivated by the employer's desire to avoid the union and its obligations under the collective agreement, and as such, contravened ss. 64 and 66 of the Act. The Board was asked by the union to determine whether the Medox employees would really be Kennedy Lodge employees under s. 106(2). If they were, the union submitted that the lay-off of more senior employees constituted a massive repudiation of the collective agreement contrary to s. 50. In the alternative, the union submitted that Medox was bound by the provisions of the existing agreement as a related employer under

s. 1(4). The employer cited its right, pursuant to the collective agreement, to contract out work "where the employer finds it necessary" and denied any anti-union motivation. The employer further argued that Medox was an independent entity which employed the persons it supplied.

The Board had to first determine whether Medox or Kennedy Lodge was the employer of the employees hired by Medox. While the collective agreement permitted contracting out, the agreement would not permit an arrangement where Kennedy Lodge remained the employer. The effect of that arrangement would simply be the replacement of union employees with non-union employees. The Board then reviewed the relevant criteria for determining the identity of the real employer. Kennedy Lodge had purported to contract out its "core" activity of providing nursing care. The circumstances of the subcontract and the regulations under the *Nursing Home Act* governing Kennedy Lodge were such that Kennedy Lodge retained control over the persons supplied by the contractor and was therefore their real employer. Thus, the attempt to employ new employees while more senior employees were laid-off constituted a breach of ss. 50 and 64. In the alternative, the Board found that Kennedy Lodge and Medox were related employers within the meaning of section 1(4), and therefore, even if Medox were the real employer, it would be subject to the collective agreement between Kennedy Lodge and the Union.

The Board went on to observe that although sub-contracting in accordance with a collective agreement to avoid the provisions of a collective agreement may not *per se* be unlawful, a subcontracting of "core" – as opposed to "peripheral" – activities that occurs on the employer's premises, with employer's equipment, and under the employer's control, is a breach of the Act, notwithstanding permissive provisions in the collective agreement operating ostensibly to the contrary. The work of the employees that was subcontracted in this case formed part of the employer's core activity, namely, hands on nursing care. Finally, the Board noted that a sub-contracting may lead to certain rebuttable inferences. The circumstances of this case led to a rebuttable inference of anti-union motivation being drawn by the Board. The Board concluded that, while Kennedy Lodge may be in financial difficulty, it was open for Kennedy Lodge to seek contract concessions from the union, which has an interest in its members' continued employment. This the employer had not done. *Kennedy Lodge Inc. et al.* [1984] OLRB Rep. July 931.

Union in vote position withdrawing and refiling to avoid vote – Board directing vote despite membership over 55%

The applicant union applied for full-time and part-time bargaining units. While it had sufficient membership support in the full-time unit for certification without a vote, it was in a vote position with respect to the part-time unit. On May 31, 1984 the union sought consent to withdraw the application with respect to the part-time unit after a vote had been directed by the Board. In view of the timing of the request, the Board dismissed the application by decision dated June 1, 1984. Subsequently the union filed a new application with respect to the same part-time unit, using all of the membership evidence filed in the first application, and an additional card, which was sufficient to push its membership support over the 55% level required for automatic certification. The employer, relying on *Mathias Ouellette*, argued that the Board should refuse to entertain the application and impose a six month bar.

The Board held that this was not a case where the first application was withdrawn in anticipation of defeat in the vote and refused to impose a bar. However, it held that, the union by withdrawing and filing a new application, should not be able to avoid a vote already directed by the Board. A vote was directed again despite the level of membership support. *Children's Aid Society of Owen Sound*, [1984] OLRB Rep. July 995.

Test for determining employee status of employees engaged in more than one craft

The union applied for certification as bargaining agent for a bargaining unit of truck drivers in the employ of the respondent pursuant to the construction industry provisions of the *Labour Relations Act*. The Board outlined the description of the bargaining unit appropriate for collective bargaining which essentially placed all truck drivers in the respondent's employ in a single unit. The applicant challenged the inclusion of two employees of the respondent on the list of bargaining unit employees. The applicant argued that the two individuals were either primarily employed as labourers and not as truck drivers, or alternatively, if employed as truck drivers, they drove trucks of a different type so as to preclude the establishment of a community of interest between them and the other drivers in the unit.

The Board indicated that construction industry bargaining units are generally described in terms of the particular craft of the employee. As such, the Board requires that all employees pertaining to that craft be included in the bargaining unit, to avoid the fragmentation and proliferation of construction industry bargaining units. Therefore, the two individuals sought to be excluded by the applicant, were correctly included in the list of employees, assuming they were in fact employed as truck drivers.

In determining whether the employees in question were primarily employed as labourers or truck drivers, the Board identified different tests to be employed in different situations. Where employees in the construction industry are engaged in a number of different crafts but are paid a single rate, the Board reaffirmed its practice of accepting the craft in which they are employed for a majority of the time as the one governing their status on an application for certification. Where, however, the employee's time is equally divided between two crafts, the skill for which such employee was primarily hired should govern the characterization, provided he is paid the appropriate rate for such trade. Where such rate is not paid, and the general criteria are not applicable, the Board suggested that the determination of the employee's status will depend on how such employee was regarded by the respondent employer at the time the application for certification was filed. *Dufresne Piling Co. (1967)*, [1984] OLRB Rep. July 924.

Employee outside geographic scope of unit having no status to bring termination application

In this application, an employee of the intervener contracting company employed at Hamilton applied for a declaration that the respondent trade union no longer represented employees in the bargaining unit for which it was the bargaining agent. The respondent union opposed the application on the basis that it held bargaining rights for employees in Board area #8 only and that the application had therefore not been brought by an "employee in the bargaining unit" as required by section 57 of the Act.

The Board reviewed the bargaining history between the union and the company. The union had been party to a collective agreement with a voluntary association of contractors of which the employer was not a member. In settlement of a successor rights application under the Act, the employer agreed to be bound to the association agreement, the scope clause of which accorded the union bargaining rights for a province-wide bargaining unit. Upon expiry of the agreement, the association concluded a new agreement with the union incorporating an identical scope clause. Shortly thereafter the Board granted the association an order of accreditation as bargaining agent for all employers employing individuals represented by the union, within Board area #8. At no time was the employer a member of the association.

The Board dismissed the termination application. The Board concluded that as the first collective agreement had not been renewed, and as the employer was at no time a member of the association, the association had no authority to bind the employer to a province-wide bargaining unit. The effect of the Board's accreditation order was to bind the employer to the association agreement only to the scope of the accreditation order itself, namely Board area #8. Accordingly, the union held bargaining rights only for employees of the employer engaged in Board area #8.

The Board observed that section 57(2) of the Act contemplates a termination application being brought by an employee in "the bargaining unit defined in a collective agreement". In this case the collective agreement described a province-wide unit that would include the applicant. It held, however, that the phrase "the bargaining unit defined in a collective agreement" is not to be read literally where to do so would lead to the Board's considering the wishes of persons other than employees for whom the union holds bargaining rights. Rather, the "bargaining unit" for purposes of a termination application includes only those employees the union is entitled to represent. As the applicant was not an employee engaged within Board area #8, the application should be dismissed. *Rennie Sheet Metal Ltd.*, [1984] OLRB Rep. July 1004.

E.B.A. entitled to notice of termination application in ICI sector

At issue was whether on an application to terminate bargaining rights of a union in the industrial, commercial and institutional sector of the construction industry, an employee bargaining agency was entitled to notice of the application.

The local that was the object of termination application was a constituent local of the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (the "Conference") being a council of trade unions comprised of the Ontario locals of the International Union of Bricklayers and Allied Craftsmen (the "International"). The Conference and the International constituted the employee bargaining agent designated pursuant to clause (a) of section 139(1) of the *Labour Relations Act*, and as such, constituted the union party to the provincial agreement applying to the relevant employees in the ICI sector of the construction industry in the Province. The International, the Conference and their affiliated locals were affiliated bargaining agents within the meaning of section 137(1)(a) of the Act.

Counsel for the Conference submitted that because the Conference represented the designated employee bargaining agency and as such was a party to the provincial agreement which set out the rights of the local, it was a party with a direct legal interest in the proceedings and therefore should have received notice of the application and the hearing. Counsel for the employer submitted that since proper notice was served on the local, and since it was a constituent local of the Conference, such notice should be considered proper notice to the Conference.

On reviewing the facts, the Board determined that the provincial agreement between the International, the Conference and the Masonry Industry Employers Council is an agreement without reference to sectors of the construction industry and as such applied to all sectors of the industry. A previous Board decision declared the employer to be bound to the provincial agreement in respect of all sectors of the construction industry. The bargaining rights contained in the provincial agreement with respect to the ICI sector extended to all affiliated bargaining agents of the employee bargaining agency. Consequently, if a declaration terminating bargaining rights in respect to the ICI sector were to issue, it would extinguish bargaining rights in the sector for all affiliated bargaining agents. As a result, the affiliated bargaining agents were held to be entitled to notice. Since the International and the Conference, as the designated employee bargaining agency, is the agent for affiliated bargaining agents, for purposes of concluding a provincial agreement, the Board concluded that it is entitled to notice of the application and the hearings into the application. *Stuart Riel Masonry Contractor*, [1984] OLRB Rep. July 1011.

Causing others to engage in an unlawful strike

The applicant, a general contractor in the construction industry sought a declaration and direction against the respondent Electrical Workers' Union pursuant to s. 135 of the Act as amended by S.O. 1984, c. 34, s. 3 (proclaimed in face June 27, 1984).

The applicant subcontracted the electrical work on one of its job sites to a non-union company. Other tradesmen on the site were unionized. The site was picketed by the International Brotherhood of Electrical Workers. No tradesman of the unionized subcontractors of the applicant crossed the picket line. The respondent stressed that it did not tell anyone to not go to work and that the purpose of the picket line was "informational" only. The Board noted that it has long been recognized that affiliated building trades of the construction industry can be expected to, and do, respect each others picket-lines without having to be expressly "told" to do so. S. 135 as amended prohibits any act that, "as a probable and reasonable consequence", will cause others to engage in an unlawful strike. Given the reality of the construction industry, as reflected both in Court decisions and in Board cease-and-desist directions made prior to the amendment, as well as the impact of the picket-line in the case at hand, the Board held the respondents cannot credibly argue that they did not know or ought not to have known that their picket-line would have caused others to engage in an unlawful strike. The Board accordingly ordered them to cease and desist in their picketing. *Acme Building & Construction Limited and IBEW, Local 1687 and Lou Popovitch*, [1984] OLRB Rep. Aug. 1037.

Refusal to extend leave of absence arbitrary and contrary to s. 69

The complainant was a member of the respondent trade union for 17 years. He alleged that his union violated s. 68 and s. 69 of the Act in refusing his request for an extension of a leave of absence and posting his job for seniority bid without giving him adequate opportunity to explain the reasons for his late return.

The union's responsibilities under the collective agreement included referring members to employment and granting leaves of absence. In 1983 the complainant, an avid sailor, was granted a 5 month leave of absence to permit him to sail his boat across the Atlantic. While he was on that leave of absence, the union's Executive Board decided to recommend to the membership that the complainant's job be posted for seniority bid if he did not return on time. The union subsequently received a letter from the complainant advising that he was unable to return by the date originally contemplated due to adverse climatic conditions, and requesting an extension of his leave of absence. The letter was read at a general membership meeting held prior to the expiration of the leave of absence. At that meeting the membership accepted the Executive Board's recommendation that the job be posted if the complainant failed to return on time. The union made no attempt to notify the complainant of that decision. When he later became aware of it, the complainant immediately sent a telegram requesting an opportunity to defend his position. The matter was raised at the next general membership meeting, which was held after the complainant's leave had expired but before he had actually returned. Although a majority of the members voted to keep the complainant's job open, they did not constitute the two-third's majority required to rescind the previous motion. Accordingly, the complainant's position was put on the floor for seniority bid and filled by another member of the union.

The respondent submitted that s. 68 was inapplicable because it only covers union representation vis-a-vis an employer. The respondent also submitted that the refusal to extend the complainant's leave was merely incidental to its function of assigning work and did not attract the s. 69 duty.

The Board agreed with the respondent's submission on s. 68 but found a violation of s. 69. In so doing, the Board followed its decision in *Maurice Berlinguette* in which it held that s. 69 is not restricted to acts or omissions in the actual selecting, referring, assigning, designating or scheduling of persons to employment. Moreover, the Board found that the decision to not extend the complainant's leave of absence was inextricably interwoven with the decision to post the complainant's former position and refer the successful bidder to it. There was no evidence of discrimination or bad faith, but the Board found that the union did act arbitrarily, commencing with the Executive Board's decision to recommend that the job be posted if the complainant did not return to work on time. The Board noted that that decision was made before the leave had expired, and was made without any consideration of the variety of legitimate reasons why an individual might be late in returning to work. The Board further noted that after receiving the complainant's letter, the Executive Board proceeded to encourage the membership to vote in favour of depriving the complainant of his highly valued position without providing the complainant with any indication that they intended to do so, and without providing him with an opportunity to argue against such action by detailing the reasons for his lateness (the legitimacy of which was not disputed at the hearing). No satisfactory reason was advanced as to why it was necessary or appropriate for that action to be taken in such a precipitate fashion, which directly and foreseeably created a situation in which a two-third's majority vote would be required to restore the situation which existed before the motion. The parties were granted an opportunity to attempt to agree on appropriate redress for the complainant. *John Bellenger and Toronto Motion Picture Projectionists' Union, Local 173 of the IATSE, and Chuck Morrow*, [1984] OLRB Rep. Aug. 1039.

National bargaining beyond the scope of exclusive bargaining rights

The complainant meat packing company alleged that the respondent union had violated s. 15 of the Act and requested the Board to order it to bargain in good faith. The Board accepted testimony of the long history of national bargaining in the meat packing industry. The parties had bargained on a national basis for many years. Representatives of the corporation and local plants would bargain for the company. Representatives of the International and each local would bargain for the union. When a settlement was reached, each local would conduct a ratification vote. The chairman of the national bargaining committee would tally the results of the votes. An overall majority was required to ratify the settlement. Then a single collective agreement would be executed covering all plants.

The latest collective agreement expired in 1984. The company insisted on bargaining on a local basis for its Kitchener plant. The Kitchener local of the union wanted to maintain the national bargaining arrangement. The company's final contract offer for settling a collective agreement for the Kitchener plant was rejected in a vote pursuant to s. 40 of the Act. A director of the International recommended rejection because of the employer's refusal to bargain nationally. The Kitchener plant went on strike and remained on strike to the date of the hearing.

The Board recognized that the parties had a mature bargaining relationship (on a national basis) despite there being no statutory foundation for it. The question to be determined was whether the respondent's defence of this relationship violated s. 15 of the Act. This conduct must be assessed within the framework of the Act. The bargaining unit is the critical starting point for collective bargaining. A bargaining unit is a unit of employees to which a trade union's exclusive bargaining rights apply. Its scope can be altered by agreement of the parties. It is, however, circumscribed to the Province of Ontario by the Act. The Board did not have to determine whether the appropriate bargaining unit of the complainant's employees was the plant or all plants in the province because the employer only has one plant in Ontario for which the union held bargaining rights. For the purposes of this complaint, the Board found that the employees of the Kitchener plant constitute the bargaining unit.

The collective agreement was unclear on the bargaining rights held by the international and the local. They traditionally bargained together and together engaged in bargaining which formed the subject matter of this complaint. They refused to negotiate except in the context of national bargaining. The objective of national bargaining covers employees outside the exclusive bargaining rights for the Kitchener plant and beyond the jurisdictional scope of the Act. The respondents were thereby attempting to bargain beyond the legal limits of their exclusive rights. The Board found it inconsistent with the scheme of the Act and unlawful for the respondents to pursue this objective to impasse. It was a major factor in the rejection of the employer's last offer and the subsequent strike. The Board declared that the respondents were in violation of s. 15 of the Act and directed them to return forthwith to the bargaining table to bargain in good faith.

In a dissenting opinion, Board Member Armstrong stated that the employer was undermining a stable collective bargaining relationship on the basis of a technical violation of the Act. He agreed with the factual and legal analysis of the majority but would exercise the Board's discretion to refuse a remedy. *Burns Meats Ltd.*, [1984] OLRB Rep. Aug. 1049.

Transfer of licence by insolvent nursing home held to be a sale

The Board considered both an application under section 63 of the *Labour Relations Act* for a declaration of successor employer and a complaint under section 89 of the Act. The complainant was the bargaining agent for a unit of employees who were employed at Willson Nursing Home in the City of St. Thomas, which facility contained 75 beds. The operator of that home granted a security interest in all the property and assets of the Home to a bank. As a result of the operator's failure to make its scheduled payments, the bank appointed a receiver for the home.

The respondent in the present case had been granted a licence to operate a 41-bed nursing home in a facility in the same city. Just prior to obtaining the licence, the respondent also made an offer to purchase the licence for the Willson Home following the receivership. The Ministry of Health ultimately approved the issuance of a licence to the respondent to purchase the licence to operate the Willson Home on the understanding that all existing residents would be accommodated in a transfer to the respondent's new facility. Upon the completion of the new facility, the receiver sent notices of termination to the employees at the Willson Home, which were followed by letters from the respondent inviting such employees to apply for employment at the new facility. However, the new employment was to be part-time only, with the hours of work varying from week to week.

The complainant union alleged, *inter alia*, that a sale of a business had occurred between the insolvent company and the respondent through the medium of the receiver, by virtue of a Management Agreement entered into by the parties. As a result, it was submitted that the respondent was bound to the applicant's collective agreement so that the hiring of additional employees to staff the respondent's new facility was an accretion to the bargaining unit. In addition the complainant argued that any question of intermingling subsequent to the opening of the new facility was not relevant and the provisions of section 63(6) did not come into play. Alternatively, the complainant submitted that a sale of a business had occurred upon completion of the transfer of the licence to the respondent and therefore the new facility should have been staffed in accordance with the collective agreement.

The Board reviewed the case of *Riverview Manor*, [1983] OLRB Rep. Sept. 1564, and observed that in the case of a government licensed nursing home, the licence is the essence of the business. Therefore, despite the fact that the assets of the business other than the licence were not actually transferred to the respondent, the actual surrender of the licence by the previous operation of the Willson Home and the respondent's acquisition of an equivalent one, constituted a sale of a business within the meaning of the Act.

The Board also determined whether the respondent was the employer during the period the Management Agreement was in force prior to completion of the licence transaction. The Board reviewed the indicia of the employer-employee relationship originally set out in the case of *York Condominium*, [1977] OLRB Rep. Oct. 642, for the purpose of identifying the party exercising fundamental control over the working lives and environment of the employees in question. Since the Board found that the respondent ran the Willson Home in all material respects on a daily basis and exercised ongoing control over both nursing and staffing policies in the Home, it concluded that the respondent was the employer of the employees at the Home.

The Board then analysed the question of whether there had been a sale of the business by virtue of the arrangement set out in the Management Agreement. Given that the respondent, *inter alia*, was the true employer, retained all revenues generated by the business and assumed responsibility for taxes and insurance, there were strong indications that it came within the expansive definition of "sale" contained in section 63 of the Act. Although the respondent/receiver relationship had many of the attributes of a lease relationship, the Board observed that section 63 contemplated the inclusion of a lease arrangement within the scope of the sale definition. The fixed monthly fee paid by the respondent to the receiver, although characterized by the parties as compensation, was in fact more akin to rent paid by the respondent out of the profits it acquired through control of the business.

On the basis of the foregoing conclusions, the complainant submitted that the respondent was bound by the collective agreement and any additional hirings in the City of St. Thomas were simply accretions to the bargaining unit given the scope clause in the collective agreement. In response, the Board noted that although section 63(2) of the Act provides that a purchaser of a business covered by a collective agreement is bound by that agreement, the section also provides that the Board may declare otherwise. Such declaration may be based on subsections (5) and (6) of section 63, the sections addressing situations where the character of the business is substantively different following the sale, or where there is substantial intermingling of two businesses operated by a successor employer. The Board rejected the respondent's submission that there had been substantial change sufficient to bring the respondent within the remedial provisions of section 63. However, the Board also rejected the complainant's submission that all employees in the City of St. Thomas were caught by the scope of the collective agreement. The Board noted that where a business covered by a collective agreement is purchased and is not expanded by or integrated with the work provided by a second existing business, the provisions of section 63(6) do not apply, irrespective of where the employees are drawn from. A purchasing employer does not create a situation where the bargaining rights attaching to a single newly acquired business are called into question simply by supplementing the bargaining unit with employees not previously covered by the collective agreement, whether they are newly selected or come from an entirely different location of the employer. The focus of section 63 is on the business, and it is the practical problem of running two integrated businesses, either under two different collective agreements, or one under a collective agreement and one non-union, which prompted the enactment of subsection 63(6). This was, in the Board's view, consistent with the terms of section 63(3) which provides that a trade union continues to be a bargaining agent for employees of the person to whom a business is sold in the like bargaining unit in that business. Therefore, the employees bound by the collective agreement subsequent to a sale are only those employees who were bound by the collective agreement prior to the sale. Section 63 is designed to preserve, but not extend, the *status quo*.

The Board went on to find that there had been an intermingling of employees of the unionized Willson Home and that the respondent's new facility was not covered by a collective agreement. The provisions of section 63(6), therefore, had to be applied, and this was to be done on the basis of comparative numbers. The Board observed that even if all employees of the Willson Home accepted jobs at the new facility, the mix of organized and unorganized employees would be almost evenly divided. Therefore, the Board ordered the taking of a representation vote among all the employees of the Willson Home and the new facility, following the completion of the re-staffing of the two institutions, in a manner consistent with the original Willson Home employees' rights under the collective agreement. The Board noted that although it was unusual for a representation vote to be taken without a freeze being imposed on the list of employees eligible to vote, in light of the parties' desire to avoid continued litigation and incentive to agree upon a basis for re-staffing the Willson Home, it would order the vote in the present case. *Caressant Care Nursing Home of Canada Limited*, [1984] OLRB Rep. Aug. 1060.

The extent of successor employer's obligation to retain employees of predecessor

In a previous proceeding the Board declared that the respondent was a successor employer within the meaning of s. 63. This complaint alleged that the employer was deliberately flouting the law by ignoring the Board declaration, refusing to recognize the applicant union and not implementing any of the provisions of the collective agreement. One of the consequences of this employer conduct was that a large number of the predecessor's employees had been thrown out of jobs they had held for years. The union sought a variety of remedies including reinstatement and compensation.

At the heart of the dispute was the effect of a s. 63 declaration on the rights of employees who were employed by the business sold. The Board examined the structure and purpose of s. 63. The principal thrust of the section is to preserve the labour relations "*status quo*" through the transfer of a business. It transforms the collective bargaining rights of employees "into a form of 'vested interest' which attaches to the business entity and like a charge on property 'runs with the business' ". The section "abrogates the notion on privity of contract, and virtually eliminates the significance of the separate legal identity of the new owner". A prospective transferee is expected to investigate and take into account the terms of any agreement a predecessor has made with its employees. The Board will give a liberal interpretation to s. 63, in keeping with its remedial thrust. In determining the possible application of s. 63, the Board will be more concerned with the substance rather than the form of a transaction. Particular attention is paid to the work performed before and after the transfer. If the work remains similar, this supports an inference that s. 63 applies.

The respondent sought to distinguish *Emrick Plastics Inc*. [1982] OLRB Rep. June 861, where the Board held that a successor employer under s. 63 of the Act did indeed have an obligation to retain his predecessor's employees unless those employees could be laid off or terminated in accordance with the terms of the collective agreement. The Board found that s. 63 preserved the employees' right to trade union representation, their collective agreement, and, most important, their jobs — so long as those jobs were continued in the successor's operation.

The respondent argued that *Emrick* was distinguishable because here unlike in *Emrick*, the respondent's business operated simultaneously with that of the predecessor for one week. The respondent argued that the employees of the predecessor had been laid off and had no right to displace the "pre-existing employees" it had already selected for its new facility. The union argued that the bargaining rights of its members continued through the transaction and that a variety of remedies, including reinstatement and compensation should be granted.

The Board, in a majority decision, pointed out that the predecessor, who was bound by a collective agreement could not discharge its employees without just cause. The impending transaction did not constitute just cause in light of the fact that their work would continue to be done. They were dismissed contrary to the terms of the collective agreement and Act. The respondent "stood precisely in the shoes of its predecessor" when it acquired the business and was thus responsible for the existing obligations under the collective agreement. S. 63 cannot be undermined by a predecessor laying off its employees when their jobs are to be maintained by a successor. Likewise any reorganization by the successor of the work force must be done in accordance with the terms of the collective agreement. The fact that the respondent gradually acquired parts of the predecessor's business did not affect the rights of the predecessor's employees. They became employees of the respondent as the transaction unfolded. The newly hired employees had little if any seniority under the collective agreement. If the collective agreement was adhered to, the bulk of the predecessor's employees would be working at the new facility. The Board held that the respondent had a *prima facie* obligation to retain the predecessor's employees, who could only be terminated or laid off in accordance with the terms of the collective agreement. *Daynes Health Care Limited and Earl Daynes*, [1984] OLRB Rep. Aug. 1091.

Procedure where non-compliance with Board order alleged

In an earlier hearing, the Board had determined that the respondent had contravened section 66(a) of the *Labour Relations Act* by laying off the complainant before the normal end of the work season because he had enlisted the assistance of his trade union. Subsequent to that decision, the Board was notified by letter from counsel for the complainant that the respondent had failed to pay the complainant the back wages and interest thereon in the amounts required by the earlier decision. The Board had forwarded that letter along with a covering letter to the respondent outlining the provisions of section 89(6) of the Act providing for the filing of an order in the Supreme Court for enforcement as a judgment or order of that Court.

The Board reviewed the procedure in regard to the provisions of section 89(6). It noted that although the section permits the Board to file its determination in the Supreme Court upon merely being notified of non-compliance, it has generally required a party requesting the filing to prove non-compliance at a hearing convened for that purpose. However, more recently the Board introduced a procedure of advising the respondent of non-compliance and requesting its submissions on point. Where the respondent either agrees that there has been a failure to comply with the Board's decision or does not respond to the allegation, the Board will file its determination in the Supreme Court without any hearing, as it will normally be satisifed that there has been a failure to comply. *Lloyd McHugh & Son Limited*, [1984] OLRB Rep. Aug. 1117.

"Penalty" clause in collective agreement held to be enforceable

The trade union referred a grievance to the Board pursuant to section 124 of the *Labour Relations Act*. In an earlier decision on the same matter, the Board found that the respondent company had failed to meet the time limits stated in the collective agreement for payment of certain sums to an employee welfare plan and union dues deducted from employee wages. The Board had ordered payment of the outstanding amounts but had reserved on the question of enforceability of a "penalty" provision in the collective agreement.

The collective agreement provided for payment of a basic interest charge on the monies the employer failed to remit to the union as required by the agreement. In addition, it provided for a flat penalty fee where an Arbitration Board finds a violation of the aforementioned remittance provisions in the collective agreement. The respondent claimed that these amounts represented penalties for breach of the collective agreement and were therefore legally unenforceable.

The Board reviewed the existing approach of the civil courts to enforcing payment of amounts stipulated for breach of contract. It concluded that such provisions are enforced if the amounts in question constitute a genuine pre-estimate of damages, rather than a penalty. In addition, the Board noted that use of the terms "penalty" or "liquidated damages" is not conclusive of the issue, and that the tribunal must look to the true nature of the stipulation in order to make its determination.

The Board concluded that in the instant case the interest charges were properly viewed as genuine pre-estimates of the costs associated with late payment of money and not as a penalty. The fault fee was considered a conservative estimate of the union's cost in taking a matter to arbitration. The Board therefore ordered the respondent to pay the additional sums to the applicant. *Parlay Construction Ltd.*, [1984] OLRB Rep. Aug. 1120.

President of company who also worked as employee not entitled to apply for termination

The applicant, who had brought the application for a declaration terminating the bargaining rights of the respondent union, was both the President of the company and a working employee paying union dues. The respondent union argued that the applicant was precluded by section 1(3)(b) of the *Labour Relations Act* from being deemed an employee for the purpose of the application for a declaration of termination under section 57(2)(a) of the Act. The applicant argued that considering that he was an employee under the collective agreement and was required to be a member of the union and pay dues, fairness required that he be accorded the same rights under the Act as are accorded to other employees.

The Board reviewed the cases that had previously considered the rationale for segregating those performing employee functions from those performing managerial tasks. It concluded that since collective bargaining requires an arm's length relationship between the two sides to an agreement to ensure that each is organized in a manner that will best achieve its interests and allow each side to remain untainted by divided loyalties. As the applicant in question performed a managerial role, the Board concluded the terms of section 1(3)(b) of the Act prohibited his access to the provision of section 57(2)(b). *Tradesmen Fabricating Ltd.*, [1984] OLRB Rep. Aug. 1141.

Related employer provisions applied to franchise arrangement

Subsequent to a decision to close down its unprofitable stores, Dominion Stores devised a concept of franchising these stores in order to turn them around. The franchisees entered into a franchise arrangement with Willett Foods Limited, which is a corporate relative of Dominion. The franchisee who was the subject of the applications in question, Penmarkay, while conceding that a sale of a business within the meaning of s. 63 of the Act had occurred, applied for an order terminating the bargaining rights of Local 14 of the Retail, Wholesale and Department Store Union under s. 63(5). The union on the other hand opposed this application and in addition sought a declaration that Dominion, Willett Foods and Penmarkay are related employers within the meaning of s. 1(4) and therefore bound by the Dominion collective agreement.

In the majority decision dated September 24, 1984, the Board declined to grant relief under s. 63(5), noting that there has been no change in the nature of the work performed. In response to the submission that many provisions of the collective agreement designed for a province-wide chain operation are inappropriate when applied to an independent franchisee, the Board stated that a strict literal interpretation of the collective agreement must yield to a commonsense reading that takes account of the change in the employer and the scope of the unit.

Turning to the related employer issue, the Board noted that the dual criteria of "common control or direction" and "associated or related activities" in s. 1(4) have three legislative objectives, namely preservation of bargaining rights, viable collective bargaining structures and facilitating direct dealings between the union and the entity with real economic power over employees. While the Board had no difficulty concluding that Dominion and Willett are under common control, the relationship between Willett and Penmarkay posed difficulties. Examining the dealings between the entities in light of the provisions of this particular franchise agreement, including the obligations and restrictions imposed upon Penmarkay, the Board concluded that Penmarkay is controlled or directed by Willett. Having also found that Dominion, Willett and Penmarkay are engaged in associated or related activities, the Board had to decide whether it should exercise its discretion to make a s. 1(4) declaration.

While it was recognized that its finding of successor employers was sufficient to preserve bargaining rights, the Board concluded that it should, in addition, issue a s. 1(4) declaration for two reasons; namely, to facilitate meaningful collective bargaining between the employees and those exercising real economic control over them and to maintain the consolidated bargaining structure that existed. The Board declared that Willett and Penmarkay are bound by the Dominion collective agreement. *Penmarkay Foods Limited (Mr. Grocer) et al.*, [1984] OLRB Rep. Sept. 1214.

Contract out in response to financial difficulties not a lockout

The union filed a complaint under section 93 of the *Labour Relations Act* alleging that the respondent employer had threatened and subsequently implemented an unlawful lockout. The respondent ran a retirement home where the complainant had been certified to represent a bargaining unit comprising some 24 service employees. The respondent experienced increasing financial difficulties and unsuccessfully attempted to sell the home back to its previous owners and to obtain concessions from the union. As a result, the respondent decided that subcontracting the work of the employees in the bargaining unit represented by the union was its only alternative. The union was therefore notified of the intention to permanently lay off the entire membership of the bargaining unit.

Pursuant to the collective agreement, the employer requested a meeting with the union in order to consider ways to minimize the adverse effects of the lay-off on the union's members. A meeting was held at which the employer indicated that it was not seeking any concessions from the union and that its decision to sub-contract the work of the union's membership was required strictly as a matter of economic necessity. The complainant was of the view that the respondent was attempting to "bury the bargaining unit", and filed the complaint alleging a lock-out.

The Board reviewed the legal requirements for a lock-out, reiterating the need for both an objective element, involving the withholding of work opportunity, and a subjective element, involving the intention to compel or induce employees to refrain from exercising rights or privileges under the Act, or to agree to changes in terms and conditions of employment. The Board noted that the lay-off of employees does not in itself constitute a lock-out even though the consequences for employees are the same, nor is it sufficient that the employer was motivated by an anti-union animus if he had no intent to preserve the employment relationship of at least some of the employees on terms more favourable to himself. What was critical, in the Board's view, was the specific motive behind the action. In the absence of a specific intent to preserve existing employment relationships on different terms or induce employees to give up established rights, no lock-out would have occurred. The Board noted, however, that such a finding did not preclude a showing of an unfair labour practice.

The Board recognized the difficulty involved in the determination. The Board observed that as a matter of public policy it would be undesirable and contrary to the spirit of labour relations in the province to penalize employers who sought to discuss impending lay-offs with the union by deriving the necessary intent to lock-out from such discussions, while the employer who refused to discuss such matters would be immune from criticism. However, the Board expressed the necessity for caution in these matters, lest employers be encouraged to engage in unfair labour practices under the cloak of economic necessity. In the present case, the subjective element necessary to constitute a lock-out was absent. Even if there were grounds to find that the technical requirements for a lock-out had been met, the Board expressed its reluctance to grant relief for allegedly improper conduct on the employer's part, when it is merely an honest response to the union's inquiry about the action that might be taken to avoid the consequences of the employer's decision. *Preston Springs Garden Retirement Home*, [1984] OLRB Rep. Sept. 1241.

Voluntary recognition agreement ratified by employees upheld

The Applicant applied for a declaration terminating the bargaining rights of the respondent and for certification of itself as bargaining agent for employees working in food-service outlets at Pearson International Airport. The original collective agreements had been negotiated in 1982 by the respondent and Cara Operations Ltd., the latter operating under contract with the Ministry of Transport for operating and food-service outlets. In 1983, however, Cara Operations Ltd. was outbid on the aforementioned contract by the intervener in the present case, York County Quality Foods Ltd. Through negotiations between the respondent and the intervener, a Memorandum of Settlement for a new collective agreement was agreed upon, to be effective from the moment the intervener assumed responsibility for the food-service outlets. Such Memorandum was ratified by the respondent's membership, and a formal collective agreement was signed by the parties.

The applicant was seeking to set aside these agreements under the provisions of section 60(1) of the *Labour Relations Act*. The applicant argued that because the collective agreement entered into by the respondent and the intervener contained a provision requiring membership in the trade union as a condition of employment, it was the requirements of section 46(4) of the Act which had to be met. The applicant argued that the respondent had to demonstrate that at the time the collective agreement was entered into, it had a membership of not less than 55 per cent of the individuals in the bargaining unit. The applicant submitted that the respondent was not entitled to rely on evidence of membership arising out of the previous agreement with Cara as such memberships were themselves products of a compulsory membership clause in a voluntary recognition agreement.

While the Board acknowledged the safeguard intended by section 60, i.e. to ensure that a bargaining agent was not selected at random by the employer, in its view the present case did not raise this concern. Not only was the bargaining agent the agent already representing the employees at the food-service outlets, but final agreement between the respondent and the intervener had been subject to ratification by the employees themselves. The ratification vote was indicative of the will of the majority and the collective agreement in question therefore met the test set out in section 60 of the Act.

With respect to the applicant's submission that the collective agreement must fall as a result of section 46(4), the Board was of the view that the respondent had fairly established to the employer that it had as members in excess of 55 per cent of the proposed bargaining unit. The employer had been provided with copies of the existing collective agreements with Cara. These collective agreements were more than a year old and no longer subject to challenge under section 46(4). The employer had no reason to go behind the face of the collective agreement. The Board felt no compulsion to "save" the employees in the bargaining unit from a collective agreement they had every opportunity to accept or reject.

The applicant also contended that any evidence of membership relied on by the respondent was required by section 73 of the Rules to be filed prior to the "terminal date". The Board stated that this rule was of no application under section 60 or section 46(4), as the relevant evidence is determined as of the date the impugned collective agreement is entered. In addition, section 46(4) appears to require the trade union to satisfy the employer and not the Board that the requisite majority was held at the time the collective agreement was entered into. *York County Quality Foods Ltd.*, [1984] OLRB Rep. Sept. 1340.

Trade union status and scope of "teacher" exclusion

Humewood House is a children's residence which provides care for troubled youngsters. Included in its program is a regular day school curriculum which is taught by six teachers employed by the York Board of Education. As a result of a finding of an arbitration board that these teachers were not covered by its collective agreement with the school board under the *School Boards and Teachers Collective Negotiations Act*, O.S.S.T.F. brought the application for certification under the *Labour Relations Act*. When the application first came on for hearing before the Board both parties took the position that these individuals were not teachers as defined by the S.B.T.C.N.A. The Board of Education argued, however, that O.S.S.T.F. was not a trade union within the meaning of s. 1(1)(p) of the L.R.A. The Board was concerned about its jurisdiction in light of s. 2(f) of the Act, which states that the Act does not apply to teachers as defined by the S.B.T.C.N.A. It noted that it was not bound by the arbitration board's finding that the affected employees were not "teachers" as defined by the S.B.T.C.N.A., and felt that it did not have sufficient factual material on which to decide whether these individuals would be teachers as defined by s. 2(f). Accordingly, it relisted the case for hearing submissions of the parties on the matter. When the parties reappeared before the Board, O.S.S.T.F. argued the position that the individuals it had applied to represent were teachers within the meaning of the S.B.T.C.N.A., while the Board of Education argued that they were not. O.S.S.T.F. maintained its earlier position that it was a trade union within the meaning of s. 1(1)(p) of the L.R.A., while the Board of Education claimed it was not.

On the issue of whether O.S.S.T.F. was a trade union as defined by the L.R.A., the main question was whether O.S.S.T.F. could be a trade union if it included in its membership principals and vice-principals whom the school board argued were "managerial" within the meaning of s. 1(3)(b) of the L.R.A. Assuming, without deciding, that principals and vice-principals exercised "managerial functions" as defined by s. 1(3)(b), a majority of the Board held that their inclusion in O.S.S.T.F.'s membership (which was required by statute) did not preclude a finding that O.S.S.T.F. was a trade union. Within the Board's jurisprudence there was conflicting authority on this point. The majority felt that the L.R.A. itself did not support the proposition that an association cannot be described as a trade union merely because it includes within its membership persons who exercised managerial functions. The board rejected the contrary reasoning in *Hydro Electric Power Co.* [1971] OLRB Rep. Aug. 501. The majority refused to disturb the Board's finding in a previous case that the O.S.S.T.F. was a trade union.

On the issue whether the employees affected by the application were teachers within the meaning of the S.B.T.C.N.A., s. 1(m) of that Act defined a teacher as someone who: 1. has appropriate legal qualifications or permission to teach; 2. is employed by a board under a contract in the form prescribed by the regulations under the *Education Act*; and 3. is "employed as a teacher". It was common ground that the individuals in question were qualified to teach. The Board also found that the second requirement was met. Upon examining the scheme and statutory history of the *Education Act*, the Board was satisfied that these teachers were "permanent teachers" as defined by the Act, and by virtue of s. 230(2) of the Act were entitled to and deemed to have the contract contemplated by paragraph 1(m) of Bill 100. The Board also found that these employees were each "employed as teachers". In earlier cases, the Board had accepted agreements of the parties then before them, that the S.B.T.C.N.A. applied only to teachers teaching in the regular school year day school programs and not, for example, to summer school teachers. In this case the Board unanimously rejected that interpretation of the S.B.T.C.N.A., and refused to draw any distinction between teachers based on whether or not the programs in which they were employed could be characterized as "mandatory", "regular" or "normal". The Board noted that the language of the S.B.T.C.N.A. did not warrant such a distinction, and that drawing such a distinction would create parallel collective bargaining relationships for teachers, those performing "normal" duties falling under the S.B.T.C.N.A. while those performing "abnormal" duties being covered by the *Labour Relations Act*, thereby creating a "chaotic collective bargaining structure".

Having found that the employees were "teachers" as defined by the S.B.T.C.N.A., the Board found that by virtue of s. 2(f) thereof the L.R.A. did not apply to the employees affected and accordingly dismissed the application. *Board of Education for the City of York*, [1984] OLRB Rep. Sept. 1279.

Board distinguishing between hard bargaining and bad faith bargaining

Canada Trustco is a financial institution with more than 200 branches across Canada and over 6,000 employees. Only two of its branches, at St. Catharines and Cambridge, were organized, both by the complainant union. Through two rounds of negotiations involving the St. Catharines unit, which consisted only of about 15 employees, the union was not successful in making much headway. The employees were not willing to press negotiations to an impasse and the collective agreement signed amounted to little more than an incorporation of the terms and conditions and employment practices of Canada Trustco which existed throughout its operations, with the only gains being with respect to basic clauses such as union security and grievance procedure.

When the Cambridge unit, consisting of some 20 employees, was subsequently organized by the complainant, the employer was willing to meet and bargain and provide information, but insisted on signing a collective agreement on the same lines as the St. Catharines agreement. The union commenced a strike, which proved ineffective to prevent the employer continuing to operate, many employees refusing to participate in the strike. The union likened the employer's refusal to grant *some* concessions, and its insistence on preserving the *status quo* in the significant areas of bargaining to "Boulwarism" and claimed that the conduct amounted to bad faith bargaining contrary to s. 15 of the *Labour Relations Act*.

Preferring to rely on its own past decisions over U.S. jurisprudence, the Board stated that the bargaining duty under s. 15 does not require particular concessions and does not stipulate the content of collective agreements. The Board saw the facts of this case as a graphic illustration of "predominance of bargaining power as a means of settling the parties' collective bargaining differences". The union was seeking to limit the exercise of managerial authority and achieve for the employees, terms and conditions more generous than the employer was willing to pay and that the employer was providing to employees in the rest of its operation. The employer was seeking to maintain its managerial prerogatives and provide levels of remuneration consistent with its own organizational imperatives and its own perceptions of the dictates of the market place. The Board held that under our system of free collective bargaining the ultimate resolution of the differences must rest on the right of parties to resort to economic sanctions in pursuit of their own self-interest as they define it. The ultimate agreement therefore, may have little to do with what an outsider might consider a "fair" settlement, or a just allocation of rewards to capital and labour. The duty to bargain in good faith is not designed to redress an imbalance of bargaining power. A party whose bargaining strength allows it to virtually dictate the terms of the agreement does not thereby bargain in bad faith whether it is the union or the employer that has "the upper hand". The Board also noted that the employer was entitled to take into account the relative insignificance of the particular unit in its overall organizational structure.

In the circumstances of this case the Board held that the employer's conduct is properly characterized as "hard bargaining in pursuit of its own self-interest and legitimate business objectives", and that the duty to bargain in good faith had not thereby been contravened. *Canada Trustco Mortgage Company*, [1984] OLRB Rep. Oct. 1356.

Who can be "applicants" for termination under s. 57

The respondent union had two separate but similar collective agreements for the full and part-time employees of the employer. A single application was filed purporting to terminate bargaining rights with respect to both units, two persons being named as applicants. The application was accompanied by a timely petition signed by employees in both units. The union argued that since both persons named as "applicants" were members of the full-time unit, as far as the application related to the part-time unit, no "employee in the bargaining unit" had applied for termination as required by s. 57.

The Board rejected this contention and held that the named applicants are only the nominal applicants. When the Form 17 and the petition are considered together, the applications had been made by employees in both units. Since more than 45% of employees in each unit had signed the petition, votes were directed with respect to both units. *Cara Operations Limited*, [1984] OLRB Rep. Oct. 1378.

Local operations of airfreight distributor within Board constitutional jurisdiction

In this case the union applied for certification in respect of employees of an international airfreight distributor employed at its Malton terminal. The employer opposed the application on the basis that it was either an undertaking or an integral part of an undertaking extending beyond the limits of Ontario, over which the Board did not have constitutional jurisdiction.

The employer delivered freight between Malton and Canadian destinations by purchasing space on commercial air carriers on an "as needed" basis and shipping the freight to the employer's other regional terminals for local delivery. Local delivery was carried out by independent ground carriers under contract with the employer. Deliveries to and from the United States, which constituted most of the business at the employer's Malton terminal, were carried out as follows. Following customs clearance at Malton, freight was transported to Buffalo for U.S. Customs clearance and transshipment by the employers U.S. parent to its central distribution facility in Ohio. Freight was shipped between Malton and Buffalo by either an air cargo carrier or a trucking company. Both carriers performed this service under contract with the employer. Although both carriers served customers other than the respondent, shipments between Malton and Buffalo carried exclusively the employer's freight. The employer dictated the carriers' schedules and the frequency of their use, but exercised no control over the terms of employment of the carriers' employees. The carriers were entirely dependent on the employer for business on their Malton-Buffalo routes.

The employer sought to distinguish its operation from the Board's "freight forwarding" cases on the ground that the employer operated an international distribution network in which independent carriers over whom the employer exercised control linked the employer's Canadian operation with its U.S. distribution system. The employer submitted, alternatively, that its Malton operation was an integral part of a federally-regulated undertaking, namely, the carriers' operations between Malton and Buffalo, and therefore attracted federal jurisdiction.

The Board found that the employer's business was a purely local undertaking and that the Board had jurisdiction to hear the application. Although the employer exercised a high degree of "marketplace control" over its carrier companies, it neither owned the physical means of transporting the freight nor directly employed anyone to transport the freight. The employer's relationships with the carriers were therefore purely contractual relationships between a freight forwarder and a commercial carrier. The employer did not attract federal jurisdiction on the alternate ground that it was an integral part of a federally-regulated undertaking because it did not provide services essential to an operation falling under federal jurisdiction. Instead, the federally-regulated undertakings in this case provided services to the employer, who was primarily engaged in the local service of forwarding freight on behalf of its own customers. The carriers involved derived a benefit from the employer's patronage, but they did not acquire from the employer a service so essential to their operations that federal jurisdiction would attach to the employer. *Emery Worldwide*, [1984] OLRB Rep. Oct. 1412.

Failure to inform of crucial meetings breach of s. 68

A grievor brought a complaint alleging that the respondent union breached section 68 of the *Labour Relations Act* in its handling of the complainant's termination from employment with the respondent employer. The complainant had been terminated by the employer as a result of alleged rudeness to a hotel guest which was the last in a series of such incidents.

Subsequent to the termination, the respondent union prepared a grievance on behalf of the complainant. A meeting between all parties was held on October 28, 1983, to discuss the grievance. As a result of information obtained at that meeting and an independent investigation of the matter by a union steward, the respondent union was advised that there was no merit to the grievance. A union Executive Board meeting was held on November 3, 1983 at which it was decided not to proceed with the grievance, which decision was upheld at a membership meeting on November 8, 1983.

Traditionally, the union's practice in regard to handling a grievance has been to present the matter to the Executive Board and then to the membership at regularly scheduled membership meetings held every two months. A grievor is informed prior to the meetings of his right to attend and present his case. In this case, the respondent union claimed that the complainant had been informed of his right to attend the meetings and that he could write to request permission to attend. The complainant was not informed of the dates of these events, even though they were set by the time he was informed of his right to request an opportunity to attend and address the meetings. The complainant did not inquire as to the dates of the meetings as well. The Executive Board meeting was set for a mere three days after the management decision not to uphold the grievance, taken subsequent to the original meeting of October 28, 1983. Therefore, the complainant would have had to write and seek permission to attend the Executive Board meeting scheduled for only two days later.

The Board concluded that the union had breached section 68 of the Act by not informing the complainant in a proper manner of the two crucial meetings held to consider his case, which he was entitled to attend. The complainant bore no onus to inquire into these matters. The processing of the case was so fast that no reasonable person could have been expected to take action in writing immediately in order to put his case before the meeting. Subsequent opportunities to change the decision already made are not equivalent to the opportunity to bring the matter to the Executive Board and the membership in the first instance. The failure to fully advise the complainant of the impending meetings amounted to gross negligence constituting arbitrary treatment under section 68.

The remedy in this instance was to provide the complainant with an opportunity to present his case before the Executive Board and the membership. Should the membership decide to support the arbitration, the time limits contained in the collective agreement could not be used as a defence by the employer. *The Four Seasons Hotels Limited*, [1984] OLRB Rep. Oct. 1406.

Sale provision not applied to grocery store commencing operation on premises of closed down Dominion store.

The union applied under section 63 of the *Labour Relations Act* for a declaration that the respondent was bound by a collective agreement entered into by the applicant and Dominion Stores Ltd. Approximately six months after Dominion decided to close its store at the location in question, two individuals, who had formerly worked as managers for other Dominion stores took a sublease of the property and purchased the remaining assets that had been abandoned at the premises by Dominion. Upon originally closing the store, Dominion had transferred the vast majority of its assets out of the store, leaving basically fixtures such as refrigerators and counters. The store had remained abandoned through the winter months. Dominion had advertised prior to closing, urging customers to continue to shop at alternative Dominion locations. The new store had opened up with virtually a new staff. The respondents obtained a portion of their merchandise through a Dominion subsidiary.

Counsel for the union argued that a sale of a business had taken place, stressing the public perception of goodwill that ran with the location, the former employment relationship the sublessors had with Dominion, the fact that a Dominion subsidiary supplied merchandise to the new store, and the fact that Dominion sold to the respondents two-thirds of the assets necessary to put the store in operation. Counsel for the respondent contended that no sale of an ongoing concern had occurred but rather there had been an incidental transfer of unwanted assets following a conclusive abandonment of the premises in all respects.

The Board reviewed some of the previous jurisprudence that discussed the effect and intent of section 63 and concluded that the central question to be determined was whether what was sold constituted "a business". Noting that some of the facts suggested that a sale of a business within the meaning of the statute had occurred, the Board ultimately concluded that the circumstances were more indicative of the absence of a sale of a business. While the location was important in the retail industry, location by itself does not constitute a business for purposes of section 63. The total abandonment of the location as a result of Dominion's unilateral decision, the vacancy of the premises for many months with a consequential deterioration of goodwill, the removal of all assets of value to Dominion, the absence of Dominion financing for the respondents and the tenuous link between the respondents' former employment at Dominion and the opening of the new store, all mitigated against finding that the transaction constituted a sale of a business by Dominion to the respondents. *Gilham Foods*, [1984] OLRB Rep. Oct. 1423.

Employer not entitled to control structure of union bargaining committee

The union alleged that the employer had violated section 15 of the *Labour Relations Act* by refusing to negotiate with the union's bargaining committee due to the presence on that committee of an individual who had recently been discharged by the employer. The employer argued that given that the individual in question was no longer an employee and the circumstances of her discharge, it was impossible to bargain with the union so long as she was on the committee.

The Board rejected the employer's argument. The Board stated that the employer is bound to bargain with the union's bargaining committee as structured by the union and that refusal to bargain in the present case constituted bad faith bargaining contrary to the Act. *High Times Publication Ltd.*, [1984] OLRB Rep. Oct. 1448.

Board's power to quantify and award damages upon reinstatement

The Board considered a complaint under section 89 of the *Labour Relations Act* alleging that the four grievors named in the complaint had been dealt with by the respondent company contrary to sections 64, 66 and 70 of the Act. The grievors had been laid off indefinitely by the respondent on the date on which the union filed an application for certification.

Under the reverse onus imposed by section 89(5), the employer had the onus to establish that the reasons given for the lay-offs were the only reasons and also that these reasons were not in any way tainted by an anti-union motive. On reviewing the oral and documentary evidence, the Board concluded that it was more than mere coincidence that the impugned lay-offs occurred on the first business day following the day on which management came to suspect that its employees were engaging in union organizational activity. The respondent had not discharged the burden under section 89(5) of proving that it had not acted contrary to the Act in respect of the lay-offs and, as a result, contraventions of sections 64 and 66 of the Act were found.

The Board directed the respondent to reinstate and compensate the employees for all lost wages and other benefits, with interest. Counsel for the respondent raised an argument that compensation be awarded only to the grievor who had testified during the proceedings and was exposed to cross-examination on the merits. Counsel based his argument on certain arbitral jurisprudence which indicated that if the parties wish an arbitrator to deal only with the question of liability and retain jurisdiction to hold a further hearing for the purpose of quantifying damages, such a request must specifically be made during the hearing on the merits, and the other party must consent to such procedure.

The Board rejected this submission. The Board noted that as master of its own procedure pursuant to section 102(13) of the Act, it had established a practice of affording the parties an opportunity to agree upon the quantum in cases in which the Board awards compensation in an effort to reduce the length and cost of proceedings before the Board. As an incident of the Board's power under section 102(13), this practice does not depend upon consent of the parties or a request by counsel. In addition, no express retention of jurisdiction is necessary in such cases, since section 106(1) of the Act expressly empowers the Board to reconsider or vary its own decisions. No prejudice results to any party, since a complainant may return to the Board for quantification of the award if necessary. The Board also noted that there is no obligation on a grievor or complainant to testify during a hearing of the merits of a section 89 complaint, since evidence concerning pertinent facts can be placed before the Board through other oral testimony and documentary evidence.

In addition to requiring the respondent to post a notice in the work place to attempt to remedy the psychological impact of the contravention of the Act, the Board included the membership cards signed by the grievors in their calculation of whether employee support of the union was sufficient to avoid a representation vote prior to certification. *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449.

Foreman's reaction to safety complaint violating OHSA

In this complaint under section 24 of the *Occupational Health and Safety Act*, the complainant, an experienced equipment operator at the employer's underground mine, testified that he had observed unguarded blasting being carried out in contravention of company safety procedures. The failure to post guards around a blast area was normally viewed by the company as a very serious safety offence. After reporting the safety violation, however, the complainant was told by his foreman that the matter would be investigated and action taken "since you complained". Although the foreman reprimanded the blasting crew, the normal discipline was not imposed for the incident. In addition, the foreman disclosed the complainant's name to the blasting crew as the source of the complaint. Shortly afterwards, the complainant was transferred out of seniority to a different level of the mine.

The Board found that though the foreman's action did not in any way reflect the attitude of higher company management, he had created the impression that management and other employees viewed the complainant as a trouble-maker for his objection to an admittedly dangerous violation of company safety rules. In doing so, the foreman had sought to intimidate or coerce the complainant in order to deter him from further acting in compliance with the *Occupational Health and Safety Act*. While the timing of the complainant's transfer was unfortunate, it was not inconsistent with company practice and was not tainted with a desire to intimidate the complainant. In view of the perception of improper motive imparted by the foreman's action, the proper remedy was an order requiring posting of a notice to employees affirming the company's intent to observe the Act. *Inco Metals*, [1984] OLRB Rep. Oct. 1464.

Persons under termination notices counted as employees

During a certification proceeding the employer contended that certain persons should not be considered as employees for purposes of determining the count. While it was common ground that the persons in dispute were at work on the application date, in support of its position, the employer relied on the fact that the persons in question had received termination notices prior to the certification application date, to be effective at a specific future date.

The Board held that its rules for determining whether a person is an employee for purposes of the count such as the 30/30 rule, are only applicable where the person in question was not at work on the application date. The persons in dispute in this case, having been at work on the application date, were held to be employees even though they had received termination notices. *Simpsons Limited*, [1984] OLRB Rep. Oct. 1520.

ICI sector displacement application: Effect of voluntary recognition on appropriate bargaining unit

The respondent employer based in Chatham operated as a general contractor in the industrial, commercial and institutional (ICI) sector of the construction industry. The intervener, Christian Labour Association of Canada, Local 53 (CLAC), held bargaining rights for all the respondent's non-office employees employed in Board area #1 pursuant to a 1963 certificate of the Board. In successive collective agreements since 1967 the employer voluntarily recognized CLAC as bargaining agent for all its non-office employees, without geographical limitation. At the time of the voluntary recognition the employer had no employees working outside Board area #1.

In this case the Carpenters' Union Local 1256 and the Operating Engineers Local 793 made timely applications to displace CLAC in respect of units of all employees in their respective crafts employed outside Board area #1. CLAC opposed the application on the basis that by the mandatory province-wide bargaining provisions of section 144(1) of the Act and CLAC's province-wide voluntary recognition by the employer, the appropriate units for the displacement application were all employees of the respondent employed in Ontario. The applicant unions argued that the appropriate units excluded employees in Board area #1 because the employer's granting of voluntary recognition to CLAC for other areas of the province at a time when it employed no workers outside Board area #1 was improper; or, alternatively, that by granting such recognition, the employer had contributed "other support" to CLAC rendering its collective agreement invalid under section 48 of the Act.

The Board concluded that the appropriate units for the displacement applications were all employees in the respective crafts province-wide. It noted that voluntary geographic extension of bargaining units at a time when no employees were working in the added-on areas is not illegal in itself. Particularly in the geographically mobile construction industry, Board recognition of such a practice is justified on policy grounds. Therefore, CLAC's claim to represent employees province-wide was valid and the applicants were obliged to displace CLAC in the geographical unit set out in the collective agreement. The Board held that this was an appropriate case in which to exercise its discretion under section 6(3) of the Act to allow applicants to "carve out" a craft unit from CLAC's existing all-employee unit. This course was particularly compelling in light of the Board's longstanding practice and the disability upon craft unions against representing ICI-sector employees outside their provincial bargaining designations. *Ben Bruinsma and Sons Ltd.*, [1984] OLRB Rep. Nov. 1542.

Application of work refusal provision given liberal interpretation

The complainant filed a complaint with the Board that he had been fired contrary to s. 24(1) of the *Occupational Health and Safety Act* for refusing to perform unsafe work. The complainant, who worked in a meat processing plant, was asked to assist in the splitting of hogs with a new circular saw. He repeatedly refused to do so as long as another individual (Sam Song) was operating the new saw. He was being asked to hold on to the carcass while Song used the saw to split it. He alleged that Song was unfamiliar with the saw and was too light to be able to control the saw's movements safely.

One of the issues before the Board was whether the complaint was covered by the language of s. 23 of the *OHSA*. The employer claimed that since the complainant was not asked to "use" or to "operate" any "equipment, machine, device or thing" and since there was nothing unsafe about the "physical condition" of the workplace, the section did not apply. The Board disagreed and held that the words "use" and "operate" are broad enough to cover a two-man operation involving a piece of equipment and in the circumstances, the complainant, when holding the hog, was involved in the use or operation of the saw. In any event, the Board held that s. 23(b) covered the situation, in that the alleged dangerous physical condition of the workplace was the improperly counterweighted saw being operated by a person who could not control it.

Giving a broad and liberal interpretation to the *OHSA*, which was a piece of remedial legislation, the Board went on to find that the work refusal in question was protected, and that the discharge was in violation of s. 24. *Bill's Country Meats Ltd. Re Gerald P. Blaine*, [1984] OLRB Rep. Nov. 1549.

Employer remedial steps not curing effect of prior unlawful action — Section 8 applied

This was an application for certification in which the union, relying on s. 8, sought certification even though it had less than 45% of employees as members. Upon learning of the union's campaign, the employer engaged in flagrant violations of the Act, including the lay-off of the chief in-plant organizer; the calling of an employee meeting at which threats were made that the plant would close if the union was successful; soliciting employee complaints and suggesting the establishment of an employee committee. An employee committee was subsequently established. The Board found that the employer continued the effects of its earlier violations contrary to s. 64 by permitting the employee committee to meet on company premises during working hours and by negotiating wage increases and improvements in working conditions with it.

Applying the three-fold criteria for certifying a union under s. 8, the Board had no difficulty concluding that there had been violations of the Act and that the union had adequate membership support for collective bargaining. As for the third criterion, the Board was of the opinion that the unlawful employer conduct was such that the true wishes of the employees were not likely to be ascertained.

However, the employer argued that s. 8 was inappropriate in the circumstances of this case in that certain remedial steps it had taken on its own initiative had eliminated the effect of its previous unlawful conduct. The evidence indicated that by way of settlement of an unfair labour practice complaint, the employer reinstated the laid-off union organizer with full compensation. The company, by letters addressed to individual employees, informed them that the employee was reinstated and also that employees were entirely free to select union representation if they so wished. Assurances were given that the plant would not close down if the union was successful. The employer also provided facilities during work hours for the employees to discuss the union without any member of management being present and permitted union representatives to attend. Finally, the employer promised to bargain with the union in good faith if the union was certified.

The Board, in a majority decision, while viewing the employer's attempts to remedy its own unlawful conduct positively, concluded that the attempts had come "too long after the unlawful conduct began". Noting also that the employer had not addressed the unlawfulness of the employee committee, which continued to exist, the Board found that notwithstanding the employer's attempts, the true wishes of the employees in the bargaining unit were not likely to be ascertained. A certificate was issued to the union. *Elbertsen Industries Ltd. Re Carpenters Union, Local 1030*, [1984] OLRB Rep. Nov. 1564.

Scope of bargaining unit in pre-hearing vote procedure

The union applied to be certified to represent a bargaining unit of employees employed by two companies at the same address. The union requested that the two companies be treated as a single employer for the purpose of the application and that a pre-hearing representation vote be held among employees in the corresponding voting constituency. The employer contended before the Board that the appropriate bargaining unit included employees of a third associated company operating at a separate location; that a Board determination of the voting constituency was a condition precedent to a pre-hearing vote, and that a hearing into the issue of the proper voting constituency was therefore necessary before a vote could be held.

The Board dismissed the employer's request for a preliminary hearing and ordered a pre-hearing vote in the constituency proposed by the union. The Board reviewed its jurisprudence and stated that it has consistently taken the position that a pre-hearing representation vote should not await formal adjudication of preliminary disputes over description of the bargaining unit. The only requirements for a pre-hearing representation vote are that the Board strike an appropriate voting constituency and satisfy itself that the union has the appearance of 35% membership support in the voting constituency. While it is necessary that the Board identify and delineate priliminary issues before making these determinations, it is not necessary that the issues be resolved, as the holding of a vote does not foreclose a full hearing of disputed issued at a later date. In this case the unit proposed by the union was appropriate for the limited purpose of a pre-hearing vote. *Satin Finish Hardwood Flooring Ltd.*, [1984] OLRB Rep. Nov. 1602.

Union strategy at arbitration reasonable; no violation of s. 68

This was a complaint under s. 89 alleging a breach of section 68, the duty of fair representation. The complaint alleged that the respondent union had conducted itself in an arbitrary fashion. Specifically, it was alleged that the union's representative at the arbitration held in respect of the complainant's discharge failed to appreciate the law applicable to the complainant's case, and thereby precluded a favourable result at arbitration.

The complainant was discharged during her probationary period, which had earlier been extended with union consent, albeit without the complainant's knowledge. The union's international representative handled the case, and having considered the case, adopted as his strategy the argument that the extension of the grievor's probationary period was invalid, and that the test for her discharge was the just cause protection afforded permanent employees. At the arbitration hearing, the parites met at the request of the arbitrator and narrowed the issue to the question of the complainant's status, the union agreeing that the complainant could claim protection under the collective agreement only if she had completed her probationary period. No evidence was called on the merits of the discharge itself.

The complainant argued that the union representative's view of the collective agreement — that probationary employees had no right to grieve a discharge or have it arbitrated — led to arbitrary conduct at the arbitration hearing. The complainant referred the Board to a growing body of case law flowing from the Court's decision *Toronto Hydro-Electric System and CUPE* (1981), 29 O.R. (2d) 18, which established that where a substantive right to grieve exists, procedural limitations on the exercise of that right were void pursuant to section 44 of the Act. The complainant argued that the collective agreement created a substantive right to grieve, and that, therefore, the union's failure to address the merits of the discharge at arbitration constituted arbitrary conduct and a violation of s. 68. The union replied that in proceeding to arbitration, it had done more than s. 68 required, and asserted that the Board might not second guess the union's strategy at arbitration. The union argued that it reached its decision after careful review, and that decision was not an unreasonable one.

The Board stated that although the union's position would have been stronger had it considered the jurisdictional argument, the fact that it did not do so did not amount to evidence of a "non-caring attitude or a summary approach" that could be considered "reckless, capricious, or grossly negligent". The Board found that the international representative put his mind to the case and made a reasonable decision as to how to proceed, in a manner completely consistent with the skill the Board expected from a union official in his capacity. The complaint was accordingly dismissed. *Smith & Stone (1982) Inc.*, [1984] OLRB Rep. Nov. 1609.

Non-unit employees without status to bring termination application

In this case, employees brought a timely application to terminate the respondent union's bargaining rights for two units, a province-wide ICI-sector unit and a non-ICI unit in Board area #9. On the date of the application the employer had no employees working in the ICI sector. The union contended that the application did not apply to bargaining rights for the ICI unit in the absence of any employees in that unit on the application date. The employer submitted that the Board should decline to follow its practice of describing the bargaining unit in terms of employees performing work in the unit on the date of application. It was urged that such a practice allowed fortuitous results in termination proceedings and unfairly discriminated against employees seeking termination, in that the short open period in termination applications tended to render applicants' error in calculating the voting constituency fatal to the application.

The Board declined to accept the employer's submissions. It observed that in view of the short-term nature of the employment relationship in the construction industry, it was the longstanding practice of the Board to count as employees in a bargaining unit only those employed in the unit on the application date. Nothing in the circumstances of this case justified departure from this policy. The Board therefore dismissed the application with respect to the ICI sector unit and ordered a vote in the non-ICI sector unit. *Stuart Riel Masonry Contractor*, [1984] OLRB Rep. Nov. 1630.

Section 68 remedy including referral to arbitration for a second time

The complainant was a R.N. with 27 years' service with the hospital. As a result of a critical report filed by a charge Nurse (Mrs. D-W) the complainant was suspended pending investigation. At all relevant times, Mrs. D-W was also the local union president. When the union appointed Mrs. D-W to represent the complainant at a meeting scheduled with the employer, the complainant objected and sought the assistance of the employee relations officer of the union and raised the potential conflict of interest of Mrs. D-W. However, Mrs. D-W was not replaced and the meeting went ahead as scheduled. Mrs. D-W attended, but under instructions from the union did not participate other than by taking down notes. At the meeting the complainant was given the choice of resigning or being fired. She was given no opportunity to seek advice, and further was misled into believing that if she resigned, the hospital would not complain to the College of

Nursing. Under pressure, the complainant signed a letter of resignation. The union later advised her to withdraw the letter but the hospital refused. The union filed a grievance but the Board of Arbitration found that it had no jurisdiction since there was a voluntary quit.

On these facts, the complainant alleged that the union had contravened s. 68 and also that the hospital contravened ss. 64 and 66. The union in turn filed a complaint alleging contravention of ss. 64 and 66 by the hospital.

The Board reviewed its jurisprudence on the meaning of s. 68 and stated that, reading the terms "arbitrary, discriminatory or in bad faith" together, there was a prohibition on conduct that was "implausible, summary, reckless or motivated by hositility or subjective ill will". The Board noted the critical job interest at stake, the right to union representation, the union's knowledge of the conflict of interest prior to the meeting, the union's failure to accommodate this conflict of interest, the mistaken belief the complainant was under regarding discipline by the College of Nursing, and the total absence of union representation at the June 9th meeting. The Board was of the view that the union's conduct was "arbitrary" in that it either failed to "put its mind to the seriousness of the consequences" to the complainant, or if it did do so, it responded in a "summary and careless" fashion. Although no subjective ill will was in evidence, the union's conduct was also discriminatory in that the complainant was denied union representation to which she was entitled under the Act.

The Board also found a breach of s. 64 by the hospital. Representation within the meaning of s. 64, said the Board, includes representation of employees at the time formal discipline is imposed as well as in the processing of subsequent grievances. "The scheme of our Act is to reverse the imbalance that exists between individual employee and employer". The employer could not decide who would represent an employee nor could it reasonably impede an employee's attempt to get union representation. The Board found that the hospital had "intentionally exploited its authority" over the complainant so as to interfere with her right to be represented.

Turning to the remedy, the Board noted that the arbitrator was not asked to rule and did not have authority to rule, on the legality of the actions of the union and the employer with respect to the complainant's resignation. While the award found the resignation to be voluntary, it was made without knowledge that the letter of resignation was obtained in circumstances where both the union and the employer were in contravention of the *Labour Relations Act*. Thus, the arbitration award which is made "final and binding upon the parties" (s. 44(2)) runs headlong into the Board's remedial authority which may operate "notwithstanding the provisions of any collective agreement" (s. 89(4)).

Stressing the need to place the complainant in the position she would have been in had it not been for the unlawful conduct of the union and the hospital, the Board concluded that the complainant must be provided with a hearing on the merits of her grievance notwithstanding the finding by the Board of Arbitration. Drawing an anology with the *Traugott Construction* case, the Board refused to give any force or effect to the letter of resignation obtained through illegal means or to the arbitration award which relied on that letter. Exercising its discretion, the Board directed that the parties appoint their nominees to a board of arbitration and to commence the arbitration process to hear the grievance on its merits, namely, whether there was just cause for the termination of the complainant. *Windsor Western Hospital, Re ONA and Ansia Mordowanec*, [1984] OLRB Rep. Nov. 1643.

Taxi broker and driver recruiting companies related employers

The union applied to be certified to represent a mixed unit of taxi drivers and owner-operators in the employ of three named respondents. The union requested that the three respondents be treated as one employer pursuant to section 1(4) of the Act. One of the three respondents, Beacon Vanier, owned and operated the dispatch system, building facilities and taxi licence plates. The other two respondents, Eastway and Labrie, owned the vehicles and recruited drivers to enter into contracts with Beacon Vanier. Drivers leased vehicles and paid a fee to Eastway or Labrie, who in turn paid a fee to Beacon Venier. Beacon Vanier prescribed and enforced work rules and disciplined drivers by withholding dispatch services. Drivers engaged by Eastway, however, did not interchange with drivers engaged by Labrie. The contract between the driver and Beacon Vanier was signed on behalf of Beacon Vanier by the principal of the recruiting company. Owner-operators appeared to contract directly with Beacon-Vanier for dispatch services.

The Board found that the three respondents should be treated as a single employer and a certificate should issue. Section 1(4) of the Act may be invoked on a certification application where, as here, the evidence suggests not only related business activities, but joint control over important aspects of the employment relationship. The Board held that whatever the true legal character of the relationships among Beacon Vanier, Eastway, Labrie and the employees, the employees were clearly under the common control and direction of the three respondents. A mixed unit of drivers and owner-operators was an appropriate bargaining unit, as all the evidence before the Board indicated that even if the owner-operators were considered dependent contractors, they were content to be in the same bargaining unit as the drivers. *Beacon Vanier Taxi (1984) Co. Ltd.*, [1984] OLRB Rep. Dec. 1682.

Effect of intervening mortgagee in possession upon sale of tavern business

A tavern business featuring nude entertainment was closed after repeated interventions by by-law enforcement authorities. After the closing, the mortgagee of the premises entered into possession to protect his security. The business was not re-opened for six months. At that time the principal of the respondent purchased the land, building and goods of the previous owner and arranged for transfer of the liquor licence. The respondent repaired and renovated the premises and re-opened business as a tavern featuring a country and western theme. The union that had represented employees of the previous owner applied for a declaration of successor rights under section 63 of the Act on that basis that a "sale of a business" had taken place.

The Board found that there had been a sale of the business and granted the declaration. The Board reviewed its jurisprudence and concluded that neither the interposition of a third party mortgagee between vendor and purchaser, nor a change in the decor, theme or clientele of a tavern operation, nor a gap of several months between closing and re-opening of the premises, made continued representation of the business' employees by the union inappropriate. Here a transfer of the tangible assets and the licence essential to carrying on the business of the tavern had taken place. As the essential character of the business and the nature of the requisite work skills had not substantially changed pursuant to the transaction, it was entirely appropriate that the union's representation rights continue. *Doyles Tavern*, [1984] OLRB Rep. Dec. 1700.

Settlement of freeze complaint not enforceable after collective agreement signed

The union filed an unfair labour practice complaint alleging a number of violations of the Act including an allegation concerning the re-organizing of nursing work and the removal of the grievor from her position of head nurse after the application for certification was filed. Subsequently, the union was certified. The complaint was settled by the parties, wherein the employer acknowledged that it had violated the Act and agreed *inter alia* to reinstate the grievor in her former position of head nurse and not to alter the wages, terms, etc. of the grievor without the union's consent. The parties then proceeded through conciliation and interest arbitration and executed a collective agreement. After that collective agreement had expired, the employer abolished the position of head nurse and laid-off the grievor. The union filed a complaint, alleging *inter alia* that the employer conduct was a breach of the prior settlement contrary to s. 89(7).

The employer argued that once a collective agreement was executed it became the only source of terms and conditions of employment and that the minutes of settlement were "spent". Further, it was argued that in agreeing not to alter terms, the settlement incorporated the statutory language of the freeze provision. Since the statutory freeze ends when a collective agreement is signed, so too the settlement must cease to operate when an agreement is signed. The union's position in essence was that since the terms of settlement did not contain any limitation as to period of operation, it was binding and enforceable for all time.

The Board noted that the earlier violation of the Act, as far as it concerned the grievor, flowed solely from the freeze provision and that if the Board had made a remedial order, it would have been limited in time and the signing of a collective agreement would have ended the effect of the Board order. That being so, the settlement, if it is to extend beyond such time period, must use clear and express language. In the absence of such language, the Board held that the settlement must be read as being inoperative after the signing of the collective agreement. Consequently, it was held that the settlement is not enforceable under s. 89(7). The majority of the Board also held that this was not an appropriate case to defer to arbitration. *Edward Street Manor Nursing Home*, [1984] OLRB Rep. Dec. 1704.

"Spin-off" utility contracting business set up by key employee not a successor or related employer

In this application for certification the intervening unions claimed to already possess bargaining rights for employees of Jen-Ry Utility on the basis that Jen-Ry was either a successor under section 63, or a related employer under section 1(4), to Pemrow, a company for whom the interveners were certified.

The evidence showed that Jen-Ry was incorporated by a key employee of Pemrow in anticipation of Pemrow's going out of the utility contracting business. For some time while he was still a Pemrow employee, the principal of Jen-Ry bid on and performed small jobs, sometimes renting labour and equipment from Pemrow to do so. This arrangement was tolerated by the principal of Pemrow. When Pemrow ceased carrying on business Jen-Ry purchased a portion of its Pemrow's vehicles and equipment and hired certain of its employees. Jen-Ry ultimately was successful in securing larger contracts of the type formerly performed by Pemrow.

The Board dismissed both of the interveners' claims for relief. Jen-Ry and Pemrow were not related employers because the two operations lacked the element of "common control or direction". The concept of common control or direction contemplates a point of central decision-making control for both entities. The Board concluded that although such central decision-making control can result from a legal relationship between the two entities, from practical or economic domination of one entity by the other, or from both, there was no such centralized control in this case. The two companies were clearly controlled throughout by their respective principals alone, and the principal of Pemrow had retained no authority or beneficial interest in Jen-Ry.

The Board also held that there had been no "sale of a business" from Pemrow to Jen-Ry within the meaning of section 63 of the Act. Although Jen-Ry had acquired some of the assets of Pemrow, it had not acquired the most significant elements in a utility contracting business, namely, general recognition in the industry and bid-estimating expertise and experience. The Board further found that Pemrow's utility business was not so completely identified with its key employee that his going into business for himself amounted to a transfer of Pemrow's "business" to the new company. *Jen-Ry Utility Contracting Co. Ltd.*, [1984] OLRB Rep. Dec. 1724.

Notice of a Termination Application in the ICI sector of the Construction Industry

The Board issued its reasons for an interim decision on a termination application. The hearing was commenced in the absence of any representative of the respondent Local union. A representative of the province-wide Conference of the International Bricklayers and Allied Craftsmen, of which the respondent is a constituent Local, showed up while the hearing was in progress. Counsel for the Conference submitted that as the designated employee bargaining agency pursuant to section 139(1)(a) of the Act, it had a direct legal interest in the proceedings and should have received notice.

Two certificates were issued to the Local pursuant to section 144(2) of the Act. One covered bricklayers and stonemasons and their apprentices in the ICI sector in Ontario. The other covered the same crafts in the local region, excluding the ICI sector. When the employer learned that the former certificate would bind it to the provincial agreement in the ICI sector, it ceased performing work in the sector. The parties had to execute their own collective agreement under the second certificate. If the parties are not bound by a collective agreement, the employees in the bargaining unit can apply to terminate the union's bargaining rights.

Counsel for the Conference submitted that the bricklayers provincial agreement was not limited to the ICI sector. It applies to all sectors of the construction industry and was, therefore, binding on the employer. The employer signed minutes of settlement, with respect to a grievance under section 124 of the Act, in which it agreed that it was bound by the provincial agreement. Counsel for the Conference argued that since the conference and the International were parties to the agreement, they were entitled to notice of the current proceedings and should be made a party to them. It was further argued that the Local did not get proper notice and, therefore, the hearing should be adjourned to serve proper notice on all parties. Counsel for the employer argued that, whether the Conference was entitled to notice or not, proper notice was served on the Local and since it is a constituent of the Conference, that notice was also proper notice to the Conference. The employer and the applicants argued that the hearing should proceed.

The Board adjourned and ruled as follows. The provincial agreement covers all sectors of the construction industry. The employer was bound by it. The Conference was the employee bargaining agency for all affiliated bargaining agents, to conclude a provincial agreement. A termination declaration in the ICI sector could affect the bargaining rights of all the affiliated bargaining agents. Therefore, they were entitled to notice. Notice to the Conference may be deemed notice to all of them. The proceedings were adjourned so that notice could be served on the International and the Conference. *Stuart Riel Masonry*, [1984] OLRB Rep. July 205.

Respondent employing persons to do construction work under government work program held to be construction employer

The respondent company owned and operated a squash club. At the time of the application for certification the club was being extended and renovated. The respondent retained the services of a construction firm to manager the project. A number of bricklayers working on the project were the subject of the application. Part of the funding necessary for the project came from a federal government program known as "Canada Works". Under this program, persons receiving unemployment insurance benefits are offered work with a "sponsor" such as the respondent. Participants in this program continued to receive unemployment insurance benefits while receiving additional payments from the "sponsor". The respondent took the position that it was not an employer in the construction industry; that it was not the employer of the individuals concerned; and further that the persons were not employees in any event.

The Board concluded that while working on the squash club project, the individuals were "employees". They did meaningful work and received a total amount equivalent to their regular wage rates. The Board also concluded that the federal government was not the employer of these employees. The work benefitted the respondent and not the government, and the government exercised no control over the employees. As between the respondent and the company managing the project, the Board noted that the respondent paid the employees, the contract entered into with the government stated that the respondent was the employer; and the respondent had notified the union that it was the employer. In these circumstances the Board held that the respondent was the employer of the employees. Since it had engaged employees in the construction industry, the respondent was found to be an employer in the construction industry. *Quorum Inc.*, [1984] OLRB Rep. Dec. 1760.

TTC drivers refusing to drive across lawful picket line engaging in unlawful strike

A lawful strike was ongoing against T. Eaton Company and striking employees had set up a picket line at the particular Eaton's location. The individual respondents, most of whom were bus drivers employed by the TTC, refused to drive their vehicles across the picket line. The union informed the employer (TTC) that the executive board had voted unanimously to endorse the picket lines and that the union members will not cross them. The TTC applied under s. 92 for a declaration of unlawful strike.

The Board endorsing the decision in *Domglass*, which was approved on judicial review, concluded that the definition of "strike" in the Act was broad enough to encompass purely sympathetic action. The Board had evidence before it that in the past the TTC has had a policy of accommodating drivers' concerns about crossing picket lines by re-routing or having supervisory personnel available. However, it was also established that about a month prior to the incidents in question, the TTC informed the union that it had reconsidered its policy and that it would no

The Board noted that it was not minimizing the union's concern as to what appeared to the union to be sudden reversal of policy by the TTC. The Board further noted that the union may even be right that the change in policy will exacerbate labour relations problems and damage the amicable relationship that had existed before. However, it was not up to the Board to judge the wisdom of the employer's decision. The "no-strike ban" is imposed by the Act as a matter of public policy and admits of no exceptions. The Board referred to prior Board decisions where the respondents raised as a defence, a clause in their collective agreement expressly permitting refusal to cross lawful picket lines. In each case, the Board's response was that it was not possible to contract out of the ban on strikes and that such clauses were void. Thus, the Board stated that employers' past practice could not stand on a higher footing than an express clause in collective agreement. Consequently, the Board declared that the individual respondents had engaged in an unlawful strike and that the union and its officers had authorized and supported such strike. Cease and desist orders were issued with respect to such conduct. *Toronto Transit Commission*, [1984] OLRB Rep. Dec. 1781.

Union Entitled to Copies of Employee Lists

In this certification application there was disagreement as to the identity of the employer or employers, the employee status of several hundred individuals claimed by the employer to be independent and/or dependent contractors and the appropriate bargaining unit description. A question arose whether the union should be permitted to review and make copies of the lists of employees.

The Board observed that, at the organizing stage, a union does not have access to the employee lists and that it must decide the group of employees it must canvass without the assistance of the lists. In making this decision, it must rely on information provided by its supporters. At the same time, the employer has to propose a unit description it deems to be appropriate; it must decide on what exclusions to seek; and it must determine the employees to be listed in the various employee schedules. These difficult decisions faced by the union and the employer often result in "list problems" and "unit problems".

The Board noted that when a list or unit problem arises, its longstanding practice is to permit the union to review the lists, so it can identify and particularize any challenges to the lists. This has been allowed because there is no policy reason for not doing so and there is nothing in the *Labour Relations Act* which makes employee lists "confidential". That being so, the Board could not see any logic in this case, in permitting a union to review the lists but refusing permission to make copies. Noting that the Board has ample authority to deal with "abuses" of the lists for other purposes, the Board held that the union was entitled to a copy of the employee lists. *Airline Limousine*, [1985] OLRB Rep. Jan. 1.

Union relaxing internal procedures in order to secure work for members found not to be in violation of s. 69

This was a complaint alleging violation of s. 69, the duty of fair referral. The facts, not in dispute, were that the employer had required several men from the respondent union's hiring hall on an emergency basis in order to perform repairs. The respondent referred the required members to the job, but some had not obtained referral slips prior to their commencing work; the hiring hall hours of operation precluded their obtaining the slips before reporting to the job. The complainant was referred to the job, and by letter from the respondent appointed job steward. He arrived late for the job, however, and the employer refused to employ him, or recognize him as job steward.

The complainant took the position that the respondent violated s. 69 by permitting its members to be hired without a referral slip, and in not actively attempting to secure his employment once he was appointed job steward. The respondent argued that strict compliance with the terms of the hiring hall rules might have resulted in work going to non-union contractors in the circumstances of the emergency.

The Board found no evidence that the union had acted in a discriminatory fashion in not attempting to compel the hiring of the complainant, commenting that the complainant was the author of his own misfortune. He did not come forward to explain his lateness in reporting for the job. With respect to the union's practice of giving referral slips, the Board stated that the issue in the case was not whether the respondent violated its constitution in referring members without slips. While deliberate disregard of internal union procedures might be relevant to the complaint, the Board found that the respondent acted reasonably in responding to the employer's request, in safeguarding the employment opportunity for all members by abridging its procedures. Although it was possible that the job to which the complainant was referred was taken by another member hired without a referral slip, the evidence suggested the contrary. The complaint was accordingly dismissed. *Thomas Beck*, [1985] OLRB Rep. Jan. 14.

Union's one-year protection after certification reaffirmed

This was an application for termination of bargaining rights. The respondent union was certified on January 5, 1984, and had commenced legal strike March 22, 1984. The respondent raised a preliminary objection that the application was premature, in that one year had not yet run from time of certification, as provided for in s. 57(1) of the Act. The applicant argued that s. 61(3)(a) modified s. 57(1) and permitted the application after six months had elapsed since the commencement of the strike.

The Board found that s. 61(3)(a) did not modify s. 57(1), for the reasons expressed in *Ontario Hospital Association*, [1980] OLRB Rep. July 1036. Accordingly, the application was dismissed as premature. *Canada Trustco Mortgage Company*, [1985] OLRB Rep. Jan. 43.

Sale or related employer provisions not applied to contract out where control and responsibility relinquished

The applicant union relied on the sale and related employer provisions of the Act in challenging the respondent employer's contracting out arrangement with respect to the dietary and housekeeping services. The promotional material of the contractor indicated that the services it provided would be carried out under the general direction of the licensee, with the contractor remaining ultimately responsible to the licensee. In the circumstances, the applicant alleged that the employer was retaining control over the performance of the contractor's employees so that those persons were in reality the employees of the respondent employer. It was submitted that as a result, the employees of the contractor were replacing bargaining unit employees.

The Board rejected the applicant's contention. The Board initially reviewed previous Board jurisprudence which addressed the question of the degree of control that one employer must have over another employer's employees to justify a finding of actual control on the part of the employer. On the facts of the present case, the Board was satisfied that the contractor had fully assumed responsibility for providing through its own organization, the nursing home's food and housekeeping requirements and retained full responsibility for control of its employees and their working conditions.

The Board also discussed the concept of core and peripheral functions introduced originally in the case of *Kennedy Lodge*, as they applied in the present case. In the former case, the Board had distinguished between the validity of contracting out work that was peripheral to the central activities of the business, and contracting out the employer's core work in place of having bargaining unit employees performing such work, on the employer's premises, utilizing the employer's equipment and under the employer's control. The Board in the present case did not attempt to further define the terms "core" or "peripheral", but simply observed that the contracting out of the work involved would not offend the sensibilities of the labour relations community as would the contract out of direct nursing care work. However, the Board noted that the issue before the tribunal remains one of intent and that it could find no basis on which to impugn the employer's activities.

The applicant submitted on an alternative basis that a violation of the Act should be found solely on the basis of the effect that a contracting out arrangement would have on the rights of the union and its members. The Board rejected the notion that a non-motive approach to the issue could be adopted. In addition, the Board refused to accept the applicant's submission that a prohibition against contracting out could be inferred from the scope clause of the collective agreement. Absent an express prohibition in the collective agreement against contracting out, no breach of the agreement would be found. *Caressant Care Nursing Home of Canada Limited*, [1985] OLRB Rep. Jan. 50.

Discharge of striking employee based on assault of strikebreaking employee; Board finds no anti-union animus

This was a complaint under section 89 alleging violation of sections 64 and 66 of the Act, arising out of the discharge of an employee during a legal strike. The employer had continued to operate during the strike, using management strike replacement employees, and one member of the bargaining unit who chose not to support the strike. On one occasion, while crossing the picket line, the strikebreaker was accosted by the complainant who handed him a .22 calibre bullet as he crossed the line, and stated, "your name's on this, you bastard", and then spat in his face. The incident was reported to the employer, who called the police. No criminal charges were laid, but the complainant was terminated from his employment.

The employer sought to justify the termination as based on a threat to an employee's life. The union pointed to the complainant's history of involvement in union affairs, as shop steward, and member of the health and safety and bargaining committees, and invited the Board to draw the inference that the employer's action was motivated by the desire to rid itself of a union activist. The union also argued that the employer's refusal to reinstate or arbitrate the discharge was similarly motivated, and constituted bad faith bargaining in violation of the Act. In the alternative, the union submitted that should no anti-union animus be found, the circumstances of the case called for a finding of a breach of s. 64 based on the Board's decision in *International Wallcoverings*.

The Board rejected the union's complaint, finding that, on the balance of probabilities, the employer's decision to discharge the complainant was not connected to his union activities. The Board noted, further, that this was not a case of clear mistake or discipline clearly out of all proportion to the misconduct in issue, and the *International Wallcoverings* approach was therefore not relevant to the complaint. *John T. Hepburn*, [1985] OLRB Rep. Jan. 75.

Proper Language for Exclusion of Employees Already Represented

This was a pre-hearing certification application in which the parties agreed to a voting constituency which contained an exclusion of "persons covered by subsisting collective agreements". The collective agreements in question were not identified.

The Board stated that parties should consider whether it is desireable to continue the use of this language in excluding persons for whom another trade union holds bargaining rights. The Board observed that that language poses potential difficulties unless the parties specifically designate the excluded employees or at least identify the collective agreements in question. In order to avoid these difficulties the Board concluded that the exclusion should read "employees in the bargaining units for which any trade union held bargaining rights as of January 3, 1985" being the date of application. *Niagara South Board of Education*, [1985] OLRB Rep. Jan. 90.

Union agreement to collective agreement limiting right of probationary employees to grieve not in violation of s. 68

This was a complaint under s. 89 of the Act alleging violation of s. 68. The complainant employee was discharged from his position during his probationary period. The respondent union grieved the dismissal, with the employer taking the position that the matter was not grievable because of the complainant's probationary status. The matter was settled in lieu of arbitration, and a resignation was substituted for the termination. The complainant then filed a complaint with the Board alleging that the union had violated its duty of fair representation.

It was the complainant's position that the union violated its duty in negotiating a collective agreement which he interpreted as barring probationers from having access to the grievance procedures upon discharge. The Board noted, however, that it has long rejected the notion that differential treatment of portions of the bargaining necessarily violated section 68. The Board did not interpret the grievance procedure under the collective agreement; rather, the Board noted that if the collective agreement provided the substantive right of just cause protection from discharge, any provision blocking resort to arbitration is void as contrary to s. 44(1), based on the Court's decision in *Ontario Hydro*. Even assuming that a union could violate s. 68 by agreeing to an illegal clause, the Board observed that the collective agreement was concluded prior to the Court's decision; no violation could be established where the union could not reasonably have known that the clause was illegal. Finally, the Board cited with approval its decision in *Smith & Stone*, for the proposition that in assessing the quality of representation provided, ignorance of a possible argument was not a matter constituting arbitrariness. The complaint was therefore dismissed. *Jack Widder*, [1985] OLRB Rep. Jan. 134.

Application of the Build-Up Principle

This was a certification application. Among the 114 employees employed by the employer on the application date (August/84) the applicant union had the support of 75% of the employees. However, the employer had firm plans to expand its operation, which would have increased the workforce by a further 130 employees by mid-summer 1985. The employer contended that the Board should not certify the applicant withou a vote in the circumstances, but rather should direct a vote to be deferred to a time when a representative number of employees in the projected workforce is employed.

The Board noted that the usual Board policy is to consider 50% of the projected total as sufficiently representative. The present group of 114 employees was slightly less than 50% of the projected total of 244. The evidence indicated that 60 additional employees would be needed to run the additional production line planned by the employer. However, 30 of those were to be hired as a group to operate the current production line on an overtime basis. The addition of this group would mean that at that time a representative group of 144 out of 244 would be in place. When this has happened, even on the basis of its present membership support, the union would still enjoy 59% of support within the representative group of 144. In other words, when 60% of the projected workforce is employed, the union would still have in excess of 55% of membership support.

In the circumstances, in balancing the right of the present employees to engage in collective bargaining now, with the right of future employees to participate in the selection of the bargaining agent, the Board concluded that the union should be certified without delay and without the need for a vote. *Woodbridge Foam Corporation*, [1985] OLRB Rep. Jan. 139.

Unsolicited employer support of which union unaware not making union a "company union"

In a number of applications filed in 1984, the UFCW sought to displace the incumbent union, CURRE, as bargaining agent for employees at a number of Swiss Chalet restaurants operated by Cara Operations Limited (successor to Foodcorp Limited) and a number of its franchisees. The employers and interveners were party to a subsisting collective agreement. These applications were filed before the "open season" of that agreement. The UFCW sought to establish that the agreement was not a "collective agreement" by virtue of s. 48 of the Act, because CURRE had been the recipient of employer support within the meaning of that section.

The Board found that in 1979, at a time when CURRE had already been certified to represent employees at a number of its locations, Foodcorp Limited had retained a security firm to dispatch undercover agents to seven of its unorganized locations, at which CURRE later won certification. In the guise of employees, these operatives were to promote representation by CURRE. The Board found that such assistance had actually occurred at least at two of the locations to which agents were sent, and held that the employer's activity had violated s. 64 of the Act.

The Board found no evidence establishing that CURRE was aware that the undercover operatives were anything other than the ordinary pro-union employees they pretended to be, or that CURRE had the slightest inkling that that employer was assisting its organizing campaign. The Board noted that the purpose of ss. 13 and 48 was to protect employees from employer interference in their selection of a bargaining agent. To hold that a union's ability to be certified or to enter into collective agreements could be destroyed by unsolicited, covert employer behaviour of which the union was totally unaware would be to provide the employer with a potent instrument for effecting just such interference. The Board concluded that the employer's unlawful interference did not compromise CURRE's independence so as to attract the application of ss. 13 or 48.

The Board noted that, if the employer interference had come to light before CURRE had been certified at those locations, it would not have granted certification without a vote, at least in the locations where interference had taken place. It considered whether it should now reopen those certification proceedings and direct a vote. The Board concluded that it would not do so in the circumstances of these cases, particularly as the "open season" had intervened and a timely UFCW application had been filed with respect to each location affected by the instant applications, so that employees affected by these applications would have an early opportunity to reconsider representation in light of the events of 1979 without the uncertainty and potential disruption of established rights which might have been the result of reopening five year old certificates.

In the result the applications in question were dismissed as untimely. *Cabral Foods Inc.*, [1985] OLRB Rep. Feb. 165.

Section 8 certification granted where employees terminated during organizational campaign

This was an application for certification in which the union requested that the Board apply the provisions of section 8. The applicant also complained under s. 89 about the termination of two employees during the organizing drive.

The evidence showed that at a meeting convened on employer premises during working hours, the respondent employer announced that it had lost a contract, and as a result, 10 employees would be laid off. Also announced at the meeting was a standard wage increase for all remaining employees, as well as the introduction of a group insurance plan. The applicant argued that the meeting was before a captive audience, convened in response to its organizational activities.

The Board found that the only plausible explanation for the termination of the grievors was their support for the union, rejecting the employer's evidence that they were no longer necessary because of a slowdown. One of the terminated employees had been active in soliciting members for the union, while the other had questioned the employer during the meeting. The Board found, further, that the meeting itself violated the Act. Having found that the Act was violated, the Board then considered whether the employer's conduct rendered it unlikely that the true wishes of employees could possibly be ascertained in a representation vote. The Board noted that while the union had signed 45% of the bargaining unit members in a one-week period, it had been unable to obtain any further cards after the termination. The Board therefore concluded that the applicant had demonstrated membership support adequate for collective bargaining, and certified the union outright pursuant to s. 8. The complainant employees were reinstated with damages and the Board ordered the posting of a notice. *Benwind Industries*, [1985] OLRB Rep. Feb. 149.

Certificate covering new business revoked where sale of business subsequently determined; Board orders displacement vote between applicant union and incumbent certified as bargaining agent for employees of vendor

The Board had certified the Carpenters for a province-wide unit of employees of Construction P.H. Grager Inc. On learning of the decision, the Labourers requested that the Board reconsider its decision, on the basis that they already held bargaining rights for the affected employees through a prior company, Pierre A. Gratton Construction Inc., which they claimed was either a related or successor employer under the Act. The parties agreed that because the Carpenters application was brought during the last two months of the Labourers province-wide agreement, should the Board find that a related or successor employer relationship existed, the Carpenters' prior application would become a displacement application which would require the holding of a representation vote.

The evidence disclosed that the owner of the Gratton Construction Company had joined forces with two other persons to form the Grager Construction Company Ltd. It was agreed that the Gratton company would remain dormant, and that the new company would bid on projects. No physical assets changed hands. Nevertheless, the Board found that a sale of business had taken place, noting that the essence of a business in a bid-oriented sector frequently resides in the experience and expertise of its management personnel rather than in physical assets such as tools or a specific location.

The Board went on to find that the business of the Gratton and Grager companies was sufficiently similar to justify the finding of a sale of business; common to the jobs undertaken by Mr. Gratton was a significant element of concrete formwork, work in which the Carpenters and Labourers' jurisdiction overlapped, and which changed the Carpenters' application for certification to a displacement application. The Board therefore ordered that a vote be held between the Carpenters and Labourers. *Construction P.H. Grager, Inc.*, [1985] OLRB Rep. Feb. 233.

Terms of displaced union's collective agreement caught by freeze period

The incumbent union held bargaining rights for the employer's part-time employees and had a collective agreement which expired on June 30, 1984. On June 11, 1984, i.e. prior to the expiry of the incumbent's agreement, the complainant union applied for certification. The complainant won the representation vote and was issued a certificate on August 29, 1984 thereby displacing the incumbent. On August 29, 1984, the complainant gave notice to bargain. The complaints filed before the Board alleged that the employer had contravened s. 79(1) of the Act by failing to pay the unit employees wages and a Christmas bonus, as required by the collective agreement between the displaced union and the employer.

The complainant submitted that the "freeze", commenced by the filing of its application at a time when the collective agreement, was still operative. That is, the certification and due notice to bargain that followed, continued to date the freezing of the terms of that agreement. The respondent contended that the freeze of the terms of the agreement did not continue beyond the date of certification of the complainant. It relied on s. 56(1) which states that "the agreement ceases to operate in so far as it affects such employees" upon certification of another union.

The Board noted that, if the freeze was triggered under s. 79(1) by the incumbent giving notice for renewal, there would be no question that the terms of the agreement would be caught. The Board held that the interposition of a certification application by the complainant union did not change that result. The Board concluded that what is frozen at the commencement of the freeze continues throughout the entire period of the freeze. Section 56(1) does not change the content of the freeze as of the date of certification, but was intended to avoid the chaotic situation of there being two bargaining agents and two collective agreements with respect to the same unit. The employer was found to be in violation of s. 79(1). *Sunnybrook Foods Limited*, [1985] OLRB Rep. Feb. 337.

Extent of union's obligation to file grievance on behalf of reluctant grievor

In this unfair labour practice complaint, the complainant alleged that the respondent union had breached its duty of fair representation by failing to grieve his termination.

The complainant had been discharged following a police investigation in which items of company property were found at his home. The complainant had discussed the matter with the local union President in the period after the discovery of the items, both before and after the employer's decision to terminate him. The complainant claimed the union President had said the union could and would do nothing for him. The Board accepted the union President's testimony that while he had said the case would be a difficult one, he had told the complainant he should come into see him to discuss the matter further and file a grievance, and had pointed out the time limits for filing. Although the complainant said he would come in, he did not do so and had no further contact with the union for five months. No grievance was filed.

Counsel for the complainant argued that the local President's failure to follow up with the complainant when he failed to come in, violated the union's duty to the complainant and that the union should have taken steps to have a personal meeting with the complainant and ascertain whether he was really aware of his rights or wanted to pursue them.

The Board concluded that s. 68 does not require a union to do more than what was done in the circumstances, holding that "a trade union's duty certainly does not require it to foment grievances on behalf of reluctant grievors." The Board also held that the union had not breached its duty by not seeking an extension of the time for grieving when the complainant finally did express a desire to do so five months later. Given the circumstances, and particularly the absence of any explanation for the delay, it was extremely unlikely that any arbitrator would have extended the time limits. The Board noted that s. 68 does not oblige a union to take extreme or indefensible positions. The complaint was dismissed. *Richard McCormick re International Association of Machinists and Aerospace Workers, Local 1673*, [1985] OLRB Rep. Feb. 296.

Picketing held to be in connection with lawful lockout

Following unsuccessful negotiations to renew collective agreements between the brewery and the union representing it's production employees, the brewery locked out its production employees. The lockout was lawful. At the time the brewery was in the process of expanding its production capacity. The expansion program involved addition and extension to its buildings, as well as the installation of a new high speed bottling line and an automated aluminum can line. Two general contractors were engaged on the premises. The "owner-client" brewery was also acting as its own general contractor in respect of certain work. In order to minimize traffic congestion at the site, the brewery had reserved one gate for the exclusive use of construction workers, while the production employees had their own separate gate. When the lockout commenced, pickets appeared at both gates. The construction workers refused to cross the picket line at the construction gate. In these circumstances, the two general contractors on site filed an application under s. 135 of the Act, seeking a prohibition on picketing.

The Board concluded that the main purpose of the picketing was to delay the brewery's expansion program and to put economic pressure on the brewery. The issue for the Board to decide was whether the construction contractors can prevent the brewery's locked out employees from peacefully picketing parts of their own work site. The applicants argued that the recent amendments to ss. 92 and 135 were intended to give the Board wide ranging jurisdiction and discretion to regulate any picketing, (including entirely lawful and peaceful primary picketing) where it leads to an unlawful strike by employees of some other employer. The Board disagreed. The purpose of the amendments were more procedural than substantive. The intention was to ensure that picketing disputes could be channelled through the expedited procedures under ss. 92 or 135 rather than under the more cumbersome route in s. 89. The Board concluded that, whether seen as a limitation on discretion or jurisdiction, s. 76(2) is a clear expression of legislative policy that activity which may otherwise be unlawful, is not unlawful when done "in connection with a lawful strike or lockout". This policy was not altered by the amendments to ss. 92 and 135.

Turning to the facts of the case, the brewery was the primary employer with which the union had a legitimate dispute. Although the construction contractors had no direct dispute with the union, they derived a distinct economic advantage from continuing their dealings. If picketing is prohibited, these dealings will continue to their advantage. To the extent that the automation progresses, the construction workers may be contributing to loss of long-term and permanent work opportunities for the locked out employees. The union's dispute with the primary employer was mainly concerned with long term job security. In these circumstances, the contractors, while not being party to a direct dispute, were economically connected with the primary employer in a contractual and economically advantageous relationship. Therefore, the Board concluded that the picketing in question was "in connection with" the lockout imposed by the brewery, despite the fact that picketing at the construction gate may well cause employees of the contractors to breach their own legal obligation to work and induce them to engage in an unlawful work stoppage. The prohibition on picketing sought was refused. *Bird Construction Company Limited et al.*, [1985] OLRB Rep. Mar. 359.

Voluntarily signed release causing Board not to entertain complaint

The complainant filed a complaint under section 89 of the *Labour Relations Act* alleging that the respondent had violated sections 64, 66 and 71 of the Act by discharging the complainant from his employment. By way of relief, the complainant sought, *inter alia*, reinstatement in his employment and compensation for all lost wages and benefits.

The respondent replied by alleging that the complainant had accepted monies from the respondent in settlement of all claims relating to the complainant's employment with the respondent, following the complainant's consultation with an employment standards officer. The complainant had, in fact, signed a release to that effect. The complainant submitted that upon signing the release at the office of the respondent's solicitor, he was both unaware of the significance of the release due to the solicitor's failure to explain the nature of the release, and incapable of fully comprehending its import, due to the complainant's inadequate knowledge of English. On this basis, counsel for the complainant argued that the release should be disregarded by the Board to the extent that it purported to enjoin the complainant from proceeding with the complaint. Counsel for the respondent argued that the release should result in the dismissal of the present complaint.

The Board observed that while it does not possess a Court's equitable jurisdiction to set aside the release, its discretion to hear a complaint empowers the Board to ignore the release insofar as it enjoins the complaint. On reviewing the evidence and the credibility of the witnesses, the Board was convinced that the complainant had been substantially aware of the import of the release when he signed it. However, in the Board's view, this was not in itself determinative of the issue, since the respondent's conduct was equally relevant due to the unequal nature of the employer-employee relationship, which the Act was designed to redress. In the circumstances of the case, the Board refused to find that the respondent had taken advantage of its superior bargaining position. Rather, it found that the complainant had not been treated unfairly, and could not now take advantage of his own failure to fully read the release prior to signing it. In the result, the Board exercised its discretion by refusing to hear the complaint. *C.E. Jamieson & Co. (Dominion) Limited*, [1985] OLRB Rep. Mar. 375.

Employer refusal to bargain with parent union imposing disputed trusteeship not bad faith bargaining

The intervener union local held bargaining rights for a unit of Diversey Wyandotte's employees. Following negotiations for a collective agreement, the Local requested appointment of a conciliator. At the same time the Local commenced steps to disaffiliate from its parent national union. The national union in response to this action purported to place the Local under trusteeship, but the Local refused to recognize the trusteeship on the ground that it had been imposed without jurisdiction and contrary to the union's constitution. A majority vote of the Local's membership subsequently approved disaffiliation from the national union and the Local commenced an application for judicial review of the declaration of trusteeship.

In the face of the internal union dispute the company secured an adjournment of conciliation proceedings. At the rescheduled conciliation meeting the company proposed that the Local and national union agree to be bound by any settlement ratified by bargaining unit employees, subject to the courts' disposition of the trusteeship question. The national union declined the proposal.

The national union filed a complaint that the company had violated section 15 of the Act by failing to bargain exclusively with representatives of the National, and each union requested a declaration by the Board that the company was obliged to meet and bargain with its particular representative. The company took a neutral position and requested the Board to provide guidance as to which party was entitled to bargain for the unit employees. The Board dismissed the complaint. The company had been willing to make reasonable efforts to reach a collective agreement but had been thwarted by the internal dispute between National and Local. There had been no suggestion that the company had used the dispute as a pretext to avoid collective bargaining. The Board declined to comment on the question of who represented the unit for collective bargaining purposes as any such comment could not bind the parties and final resolution of the matter was properly left for decision by the Courts. *Diversey Wyandotte Inc.*, [1985] OLRB Rep. Mar. 405.

Employer's right to lay-off during freeze period

Shortly after the applicant union applied for certification of employees at the respondent's Oakville store, the respondent announced the termination of a substantial number of employees at its stores, including 18 employees at the Oakville store. While not alleging anti-union motivation, the union complained that the employer actions constituted a violation of ss. 64 and 79(2) of the Act.

Reviewing the rationale and effect of the freeze provision, the Board noted that management has a general right to lay-off employees during a freeze, provided it is not otherwise unlawful. This is so because it is an established employer right to increase or decrease its workforce as conditions dictate. The Board concluded that the fact that the respondent had not previously laid-off employees at Oakville did not mean that it always did not have the right to do so. Therefore, the termination of the sales staff, which was simply a part of a reduction of staff at the Oakville store was held not to be a contravention of s. 79. The Board also found the lay-off of the receiving employees to be a result of a programme designed to consolidate merchandise processing already in place prior to the filing of the application for certification and therefore not a violation.

However, with respect to the lay-off of alterations and cleaning employees, the Board concluded that the lay-offs arose out of a departure from the manner in which the respondent carried on these aspects of its operations. The alterations work previously performed at the Oakville Store was now being performed elsewhere. The cleaning work continues to be done at the Oakville store, but by employees of an outside contractor. This was held to be an alteration of the terms and conditions of employment (or alternatively, a privilege) of the employees in question, and therefore contrary to the statutory freeze.

Dealing with the s. 64 aspect of the complaint, the Board noted that the provision proscribes employer conduct aimed at interfering with union representation. However, it does not make unlawful all employer conduct motivated by business concerns, which incidentally impacts adversely upon a union's ability to represent employees. The lay-offs resulting from the employer's bona fide attempt to cut losses was held not to be a violation of s. 64. *Simpsons Limited*, [1985] OLRB Rep. Mar. 469.

Board functus after issue of s. 124 award; without power to order enforcement of award

This case concerned a prior Board decision on a section 124 application by the union. The Board had found that the collective agreement had been violated in respect of the travel expense provisions, and made declarations concerning the amount owed each employee. The Board ordered the employer to pay the amounts owing in trust for the employees. Following issuance of that award, the employer paid the full amounts ordered by the Board to the union. The employer subsequently became concerned that the union had not paid the money over to the employees, and asked that the Board convene to compel the union to pay the monies owing to the workers in compliance with the earlier award.

The union made preliminary objections that the Board is without jurisdiction to enforce an award, and furthermore, that the employer has no authority to act on behalf of the employees, even assuming some union wrongdoing. The employer argued that its status to bring the proceedings arose from its role as settlor of the trust for the employees; and as such it has the right to ensure that the terms of the trust are fulfilled. The employer submitted that the Board ought to rectify the alleged misappropriation rather than force individuals to lodge costly and lengthy civil proceedings.

The Board noted that section 44(11) applies to construction industry arbitrations. That section provides that where a party fails to comply with the terms of an arbitration decision, the decision may be filed in the court and become enforceable as a court order. The Act does not give the Board a power to enforce its arbitration awards. The Board's powers under section 124 are limited to dealing with differences or allegations raised in a grievance. As that was done in the earlier award, the Board was now *functus*, and as a creature of statute had no inherent power to enforce terms of its orders. Thus, the employer's application was dismissed without a hearing, for failing to establish a *prima facie* case, without prejudice to any further actions before the Board or in the civil courts. *Skyline Construction Masonry Limited*, [1985] OLRB Rep. March 476.

Minister must appoint arbitrator where request made pursuant to s. 45(1)

This was a reference to the Board under s. 107 of a question concerning the Minister's authority to appoint an arbitrator under s. 45. The union had requested arbitration under s. 45, but the request had not arrived at the Office of Arbitration until after the time stipulated in the collective agreement for the submission of grievances to arbitration.

The union argued that the question of timeliness was not a matter going to the Minister's authority to appoint an arbitrator, and submitted that the Board could not properly consider the question of timeliness as it was left to the arbitrator. In the event that the Board concluded that the question of timeliness was pertinent to the Minister's authority, the union proposed to adduce evidence of a past practice modifying the time requirements stipulated in the agreement. The employer's position was that the words "no such request shall be made" required the Minister to consider the timeliness of the request, and that question was to be determined solely on the basis of the collective agreement, without reference to any alleged past practice.

The Board adopted the union's submissions, concluding that the language of s. 45 requires the Minister to appoint the arbitrator where a request is made under subsection 1, which does not address the matter of timeliness. The Board observed that an arbitrator's jurisdiction over such questions was exclusive; moreover, the Board's opinion was consonant with the purpose of s. 45, that being the creation of an expeditious alternative to the arbitration procedures in the collective agreement. Based on its conclusion, the Board declined to answer a related question in the reference, which had become moot. *Spar Aerospace*, [1985] OLRB Rep. March 480.

Insisting on blanket prohibition on union activity on employer premises bad faith bargaining

This was a complaint alleging bad faith bargaining. The allegations stemmed from the following alleged employer conduct: Failure to offer better wages and benefits than offered to non-union employees; insisting on bargaining separately with the different union negotiating committees set up for the different employer locations; pressing the dispute as to the scope of the unit to impasse; and insisting on inclusion of a blanket prohibition on union activity on company premises. It was alleged that the manner of negotiating and the content of the employer's proposals disclosed "surface bargaining".

On the question of wages and benefits, the employer conceded that its proposal would retain for management most of the rights it enjoyed with respect to non-union employees, but denied that its goal was to discourage other employees from joining a union. The company regarded the current wages and benefits fair and competitive and was not inclined to improve these for a group of employees merely because they had chosen to join a union. The Board noted that nothing in the Act requires an employer to agree to wages and benefits for unionized employees that are superior to those being received by non-union employees. Nor does the Act prohibit the employer from taking into account, when formulating its bargaining position, the likelihood that improvements in terms of employment for one group will likely impact on other groups. While offering less than what is enjoyed by non-union employees may be unlawful, such was not the case here.

On the aspect of the complaint dealing with bargaining process, the Board stated that as a general rule insisting on a time-consuming and repetitive bargaining structure with no useful purpose may be unlawful. However, in the case before it, the Board found a rational purpose in the employer's desire to negotiate separately with each union bargaining committee. The union had established differently constituted committees for each of the six locations. Given that the employer was entitled to negotiate a separate agreement for each store, the Board found nothing improper about the employer's attempt to be able to put its position directly to each of the union's six different bargaining committees.

Turning to the employer's insistence on inclusion of a clause prohibiting union activity on employer premises, the Board noted that such a clause would be so broad as to prevent employees from engaging in union activity in non-sales areas during breaks or before or after shifts. The Board viewed the employer's insistence on such a broad prohibition as improper and in breach of s. 15. The employer was directed to amend its proposal accordingly. While the Board recognized that the employer was not entitled to press to impasse its proposals with respect to amendments to bargaining unit descriptions, it was not clear that the employer had done so.

Finally the Board turned to the union's contention that the content of the employer's proposals indicated that it was only engaging in surface bargaining. While the Board did not doubt that the employer would rather not have to deal with the union, it was satisfied that the company was prepared to sign collective agreement, albeit on its own terms. The employer sought to ensure that any agreement it entered into contains terms favourable to it, terms which will retain for management most of the flexibility it currently enjoys and which will not increase its costs. The Board concluded that s. 15 does not preclude a party from taking a firm position in bargaining. The Board noted, however, that its conclusion was not meant to reflect on the "fairness" or otherwise of the bargaining position adopted by the company. Section 15 provides a legal standard against which the Board is to measure the bargaining conduct of the parties, it does not set out a moral standard. Moreover, the Act does not give the Board a general authority to decide the contents of collective agreements.

In the result, the Board found the employer conduct did not constitute a breach of the Act, with one exception. The employer's assistence on a blanket prohibition on union activity on company premises was held to be a breach of s. 15. *T. Eaton Company*. [1985] OLRB Rep. Mar. 491.

VI COURT ACTIVITY

During the year under review, the Courts dealt with three applications for judicial review. Of these two were dismissed. In the other case the Court of Appeal affirmed the decision of the Divisional Court, which had quashed the Board's decision. An application for leave to appeal the decision of the Court of Appeal to the Supreme Court of Canada was dismissed. In one case, an application to dismiss an application for judicial review because of delay was allowed by the Registrar of the Supreme Court. The High Court allowed the applicant's appeal from the Registrar's ruling and a hearing of the application for judicial review is pending.

During the fiscal year three applications to stay Board proceedings were made and all three applications were dismissed. One motion was made to the High Court for an expedited hearing of an application for judicial review. The motion was also dismissed.

The following are brief summaries of matters involving the Labour Relations Board that went to court during the fiscal year.

St. Joseph Nursing Home (Rockland) Ltd.
Supreme Court of Ontario, Divisional Court
May 30, 1984; Unreported

This application for judicial review filed by two employees of the St. Joseph Nursing Home (Rockland) Ltd. arose out of a Board decision refusing to order a new certification vote after the two employees had failed to cast their votes at the first vote ordered by the Board. The applicants raised several grounds for review which included allegations that the Board's decision was contrary to sections 2, 7 and 28 of the *Charter of Rights*.

The Divisional Court dismissed the application, stating that the Board was exercising a discretion it clearly possessed under section 103(5) of the Act. The Court noted that it was not the Court's function to review the correctness of the decision but rather to determine whether the Board had kept within the ambit of its statutory authority.

Sunsqueeze Juices Inc.
Supreme Court of Ontario, Divisional Court
August 21, 1984; Unreported

The Board considered a certification application and allegations of unfair labour practices, brought by the union, in one hearing. The Board found that the respondent employer had laid off several workers earlier than the normal seasonal layoff, and laid off one worker who was particularly active in organizing the union, and who would not normally have been laid off, in order to foil an organizing campaign, in violation of sections 64 and 66 of the Act. The employer was also held to have violated sections 64, 66 and 70 by representations made to certain employees concerning the consequences of forming a union. The union had the support of over fifty-five per cent of the employees of the respondent in the appropriate bargaining unit, which was determined by the Board. A certificate was issued. The active organizer was reinstated. Other laid-off employees were compensated for time they would have worked but for the violations of the Act.

The employer sought judicial review on grounds that the Board had exceeded its jurisdiction or denied natural justice by failing to give appropriate weight to evidence tendered by the employer; that the Board had exceeded its jurisdiction in ordering compensation to an employee about whom no evidence was submitted; that the Board had denied a fair hearing by failing to record its proceedings; and that the *Labour Relations Act* is inconsistent with provisions of the *Canadian Charter of Rights and Freedoms*.

An application for a stay of the Board's orders was dismissed. The Court held that the applicant had not established that it would sustain irreparable harm if the stay were refused. The application for judicial review is now pending before the Divisional Court.

Unlimited Textures Co. Limited
Supreme Court of Ontario, Divisional Court
August 22, 1984; Unreported

The employer sought judicial review of a Board decision to issue a certificate to a union without a representation vote. The Board had not considered a petition relevant to the exercise of the Board's discretion under section 7(2) of the Act, since it did not cast doubt on the 55 per cent support for the union established by uncontested evidence. Judicial review was sought on the basis that the Board had fettered its discretion under section 7(2) and had interpreted the section so as to contravene section 2 of the *Charter of Rights*.

The employer applied for a stay of the Board's order which was dismissed by the High Court for jurisdictional reasons. However, the Court also indicated, in the alternative, that the criteria for a stay had not been met in any event since a strong *prima facie* case had not been made out. The Board had acted judiciously and there was no merit in the Charter arguments. Following the stay, the application for judicial review was withdrawn.

Consolidated Bathurst Packaging Ltd.
Supreme Court of Ontario, Divisional Court
September 10, 1984; Unreported.

The employer applied for judicial review on the basis of a denial of natural justice in that the panel which originally heard the case had discussed the matter with other members and staff of the Board. A motion for a stay of proceedings in the matter was dismissed in January 1984, and a motion to compel inclusion of the Board's draft decision circulated at a Full Board meeting in the Board record filed in court, was also dismissed.

The employer also sought to issue subpoenas to persons identified as being present at the Full Board meeting in order to examine those persons in support of its application. The Board moved to quash the subpoenas.

The Divisional Court granted the Board's motion on September 14, 1984, being of the view that section 109 of the Act was a bar to taking the evidence of the individuals named in the subpoenas. The employer's application to quash the Board's decision was pending at the end of the year under review.

Burns Meats Ltd.
Supreme Court of Ontario, Divisional Court,

September 17, 1984, Unreported.

The Board had found that the union, in insisting on bargaining on a national basis, was attempting to bargain beyond the legal limits of its exclusive rights and therefore had violated section 15 of the Act. The Board directed the union to return to the bargaining table and bargain in good faith. The Union applied for judicial review alleging that the Board had exceeded its jurisdiction by prohibiting the union from bargaining the aforementioned objective, and had placed an unreasonable interpretation upon section 15 of the Act. The union also contended that the Board decision was contrary to the freedom of association guaranteed by the *Charter of Rights*.

The union's motion for leave to bring the application on short notice before the High Court and its motion for a stay of the Board's decision were dismissed. The application for judicial review is pending.

Broadway Manor Nursing Home et al.
Ontario Court of Appeal
October 22, 1984; Unreported

The applicant union filed a displacement application with the Board. The Board dismissed the application, holding it to be untimely on the basis that, by virtue of section 13(b) of the *Inflation Restraint Act* the "open period" had been closed. The union sought judicial review on the basis that the Board had misinterpreted section 13(b) or alternatively on the basis that the *Inflation Restraint Act* was inconsistent with the freedom of association guaranteed by section 2(d) of the *Canadian Charter of Rights and Freedoms*.

The Divisional Court, which heard the application together with two other applications relating to the *Inflation Restraint Act*, allowed the application for judicial review, quashing the decision of the Board and remitting the matter to be dealt with accordingly. One Justice based his decision on a finding that the Board's interpretation of section 13(b) was incorrect. The *Inflation Restraint Act* not being the "home" statute of the Board, he held this was a reviewable error. He found in the alternative that the Act violated the *Charter* and was therefore, to that extent, of no force and effect.

The respondents appealed to the Court of Appeal. The Court held that section 13(b) of the *Inflation Restraint Act* extends the terms and conditions of employment but not the life of a collective agreement. Therefore, the application was not untimely and no *Charter* issue arose.

An application for leave to appeal to the Supreme Court of Canada from the decision of the Ontario Court of Appeal was dismissed.

3-L Filters Ltd.
Supreme Court of Ontario, High Court
November 19, 1984

The union filed a grievance under section 124 of the Act that Ontario Hydro had contracted with the applicant in violation of a collective agreement provision obliging Hydro to deal only with subcontractors having an agreement with the union or its affiliates. The applicant sought standing to participate in the hearing before the Board. The Board dismissed the request and issue its decision by Telepost with reasons to follow. The applicant sought judicial review of the Board decision on the grounds that the Board could not continue before issuing reasons for the decision, and that the decision to refuse standing to the applicant was an error going to jurisdiction. The applicant brought a motion to stay the Board's proceedings pending resolution of the application for judicial review.

The Court held, in dismissing the application for a stay of proceedings, that the determination of any person's right to intervene was a matter within the exclusive jurisdiction of the Board and the Board could not lose such jurisdiction by undertaking to give reasons later that it was not obliged by statute to give at all. Accordingly, the applicant could not demonstrate the strong *prima facie* entitlement to the relief sought that was necessary for a stay. The application for judicial review is pending.

Ontario Hydro
Supreme Court of Ontario, Divisional Court
March 25, 1985; Unreported

The union filed a grievance under section 124 of the *Labour Relations Act* that the employer had refused to employ the grievor in jobs to which he had been referred by the union's hiring hall, including a job at one of Ontario Hydro's nuclear power plants, on the ground that a previous conviction constituted the grievor a security risk. The Board dismissed the grievance by decision dated February 27, 1984. The union sought judicial review on the basis that the Board had committed errors of law and jurisdiction in admitting certain evidence, relying on extraneous considerations, determining the onus of proof, interpreting the collective agreement, and failing to give effect to the *Charter of Rights and Freedoms*.

By decision dated March 11, 1985 the Registrar of the Supreme Court allowed the employer's motion to dismiss the application for delay in filing supporting documents as required by Rule 68.06. The Divisional Court overturned the Registrar's decision on the ground that the Board is obliged to file a record with the Court in an application for review of a section 124 grievance decision, and that the applicant's time for filing had therefore not commenced to run. Accordingly, the matter presently remains pending before the Divisional Court.

VII CASELOAD

In fiscal year 1984-85, the Board received a total of 3,509 applications and complaints, an increase of 12 percent over the intake of 3,135 cases in 1983-84. Of the three major categories of cases that are brought to the Board under the Act, applications for certification of trade unions as bargaining agents increased by 32 percent from last year, complaints of contravention of the Act rose by 5 percent, and referrals of grievances under construction industry collective agreements dropped by 10 percent. The total of all other types of cases increased by 21 percent. (Tables 1 and 2).

In addition to the cases received, 534 were carried over from the previous year, for a total caseload of 4,043 in 1984-85. Of the total caseload, 2,866, or 71 percent, were disposed of during the year; proceedings in 236 were adjourned sine die* (without a fixed date of further action) at the request of the parties; and 941 were pending in various stages of processing at March 31, 1985.

The total number of cases processed during the year produced an average workload of 404 cases for the Board's full-time chairman and vice-chairmen, and the total disposition represented an average output of 287 cases.

Labour Relations Officer Activity

In 1984-85, the Board's labour relations officers were assigned a total of 2,317 cases to help the parties settle differences between them without the necessity of formal litigation before the Board. The assignments comprised 57 percent of the Board's total caseload, and included 680 certification applications, 32 cases concerning the status of individuals as employees under the Act, 816 complaints of alleged contraventions of the Act, 745 grievances under construction industry collective agreements, and 44 complaints under the Occupational Health and Safety Act. (Table 3).

The labour relations officers completed activity in 1,961 of the assignments, obtaining settlements in 1,633, or 83 percent. They referred 170 cases to the Board for decisions; proceedings were adjourned sine die in 158 cases; and settlement efforts were continuing in the remaining 356 cases at March 31, 1985.

Labour relations officers were also successful in having hearings waived by the parties in 182, or 65 percent, of 281 certification applications assigned for this purpose.

Representation Votes

In 1984-85, the Board's returning officers conducted a total of 251 representation votes among employees in one or more bargaining units. Of these votes, 230 were concluded in cases that were either disposed of during the year or in which a final decision closing the case had not been rendered by the Board by March 31, 1985. Of the 230 votes concluded, 170 involved certification applications, 56 were held in applications for termination of existing bargaining rights, and 4 were taken in successor employer applications. (Table 5).

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* The Board regards sine die cases as disposed of, although they are kept on docket for one year.

Of the certification votes, 130 involved a single union on the ballot and 40 involved two unions. Of the two-union votes, 38 entailed attempts to replace incumbent bargaining agents and 2 involved two unions competing for certification to represent employees in collective bargaining for the first time.

A total of 14,578 employees were eligible to vote in the 230 elections that were concluded, of whom 11,930, or 82 percent, cast ballots. Of those who participated, 51 percent voted in favour of union representation. In the 170 certification elections, 81 percent of the eligible voters cast ballots, with 54 percent of those who participated voting for union representation. In the 130 elections that involved a single union, 78 percent of the eligible voters cast ballots, of whom 53 percent voted for union representation. In contrast, 91 percent of the eligible voters in the two-union elections cast ballots, with 57 percent of the participants voting for union representation.

In the 56 votes in applications for termination of bargaining rights, 88 percent of the eligible voters cast ballots, with only 23 percent of those who participated, voting for the incumbent unions. Of the 161 employees who cast ballots in the elections held in successor employer cases, 94 or 58 percent, voted for union representation.

Last Offer Votes

In addition to taking votes ordered in its cases, the Board's Registrar was requested by the Minister to conduct votes among employees on employers' last offer for settlement of a collective agreement dispute under section 40(1) of the Act. Although the Board is not responsible for the administration of votes under that section, the Board's Registrar and field staff are used to conduct these votes because of their expertise and experience in conducting representation votes under the Act.

Of the 26 requests received by the Minister during the fiscal year, votes were conducted in 23 situations, and settlements were reached in the other 3 cases before a vote was taken.

In the 23 votes held, employees accepted the employer's offer in 8 cases by 457 votes in favour to 265 against, and rejected the offer in 15 cases by 569 votes in favour to 1,964 against.

Since the section was introduced in June 1980, a total of 113 requests were made to the Minister up to March 31, 1985. The employer's offer was accepted in 19 cases and turned down in 62 cases. Settlements were reached in 27 cases and the request was withdrawn in 5 cases prior to a vote being conducted.

Hearings

The Board held a total of 1,251 hearings and continuation of hearings in 1,501, or 37 percent of the 4,043 cases processed during the fiscal year. This was a drop of 442 sittings from the number held in 1983-84. Eighty-eight of the hearings were conducted by vice-chairmen sitting alone, compared with 113 in 1983-84.

Processing Time

Table 7 provides statistics on the time taken by the Board to process the 2,866 cases disposed of in 1984-85. Information is shown separately for the three major categories of cases handled by the Board – certification applications, complaints of contraventions of the Act, and referrals of grievances under construction industry collective agreements – and for the other categories combined.

A median of 39 days was taken to proceed from filing to disposition for the 2,866 cases that were completed in 1984-85, compared with 29 days in 1983-84. Certification applications were processed in a median of 25 days, the same as in 1983-84; complaints of contravention of the Act took 50 days, compared with 34 in 1983-84; and referrals of construction industry grievances required 20 days, compared with 18 in 1983-84. The median time for the total of all other cases increased to 77 days from 47 in 1983-84.

More than 77 percent of all dispositions were accomplished in 84 days (3 months) or less, compared with 87 percent for certification applications, 74 percent for complaints of contraventions of the Act, 85 percent for referrals of construction industry grievances, and 55 percent for the total of all other types of cases. The number of cases requiring more than 168 days (6 months) to complete rose to 289 from 195 days in 1983-84.

Certification of Bargaining Agents

In 1984-85, the Board received 1,148 applications for certification of trade unions as bargaining agents of employees. This was an increase of 277 cases, or 32 percent, over 1983-84. (Tables 1 and 2).

The applications were filed by 64 trade unions, including 33 employee associations. Fifteen of the unions, each with more than 20 applications, accounted for 76 percent of the total filings: Labourers (96 cases), Carpenters (83 cases), Public Employees (CUPE) (67 cases), Food and Commercial Workers (88 cases), Service Employees International (54 cases), International Operating Engineers (38 cases), Teamsters (83 cases), United Steelworkers (50 cases), Retail Wholesale Employees (68 cases), Auto Workers (46 cases), Hotel Employees (70 cases), Ontario Public Service (50 cases), Ontario Nurses Association (26 cases), Ontario Secondary School Teachers (34 cases) and Plumbers (26 cases). In contrast, 51 percent of the unions filed fewer than 5 applications each with the majority making just one application. These unions together accounted for 6 percent of the total certification filings. (Table 8).

Table 9 gives the industrial distribution of the certification applications received and disposed of during the year. Non-manufacturing industries accounted for 78 percent of the applications received, concentrated in construction (252 cases), health and welfare services (14[illegible] cases), accommodation and food services (129 cases), retail trade (81 cases), education and related services (77 cases), wholesale trade (45 cases), and mining and quarrying (39 cases). These seven groups comprised 86 percent of the total non-manufacturing applications. Of the 257 applications involving establishments in manufacturing industries, 54 percent were in five groups: food and beverage (44 cases), metal fabricating (41 cases), rubber and plastic products (21 cases), transportation equipment (17 cases), and wood products (16 cases).

In addition to the applications received, 150 cases were carried over from last year, making a total certification caseload of 1,298 in 1984-85. Of the total caseload, 985 were disposed of, proceedings were adjourned in 15 cases, and 298 cases were pending at March 31, 1985. Of the 985 dispositions, certification was granted in 673 cases including 63 in which interim certificates were issued under section 6(2) of the Act, and 3 that were certified under section 8; 171 cases were dismissed; proceedings were terminated in 7 cases; and 134 cases were withdrawn. The certified cases represented 68 percent of the total dispositions.

Of the 851 applications that were either certified, dismissed or terminated, final decisions in 165 cases were based on the results of representation votes. Of the 165 votes conducted, 122 involved a single union on the ballot; and 43 were held between two unions, of which 41 affected incumbent bargaining agents and 2 involved two applicants. Applicants won in 91 of the votes and lost in the other 74. (Table 6).

A total of 13,069 employees were eligible to vote in the 165 elections, of whom 10,616 or 81 percent cast ballots. In the 91 votes that were won and resulted in certification, 6,126 or 76 percent of the 7,983 employees eligible to vote cast ballots, and of these voters 4,476 or 73 percent favoured union representation. In the 74 elections that were lost and resulted in dismissals, 4,490 or 88 percent of the 5,086 eligible employees participated, and of these only 35 percent voted for union representation.

Small units continued to be the predominant pattern of union organizing efforts through the certification process in 1984-85. The average size of the 673 applications that were certified was 37 employees, compared with 31 in 1983-84. Units in construction certifications averaged 7 employees, compared with 6 in 1983-84 and in non-construction certifications they averaged 46 employees, compared with 40 in 1983-84. Seventy-six percent of the total certifications, including all except 2 in construction, involved units of fewer than 40 employees, and about 38 percent applied to units of fewer than 10 employees. The total number of employees covered by the 673 certified cases increased to 24,997 from 17,043 in 1983-84. (Table 10).

A median time of 24 calendar days was required to complete the 673 certified cases from receipt to disposition. For non-construction certifications the median time was 23 days, and for construction certifications the median time was 22 days. (Table 11).

Ninety percent of the 673 certified cases were disposed of in 84 days (3 months) or less, 81 percent took 56 days (2 months) or less, 64 percent required 28 days (one month) or less, and 45 percent were processed in 21 days (3 weeks) or less. Twenty-two cases required longer than 168 days (6 months) to process, compared with 23 cases in 1983-84.

Termination of Bargaining Rights

In 1984-85, the Board received 155 applications under sections 57, 59, 60, 61 and 123 of the Act, seeking termination of the bargaining rights of trade unions, 29 more than in 1983-84. In addition, 28 cases were carried over from 1983-84.

Of the total cases processed bargaining rights were terminated in 68 cases, 48 cases were dismissed, 22 were withdrawn, proceedings were terminated in 1 case, and 44 cases were pending at March 31, 1985.

Unions lost the right to represent 1,555 employees in the 68 cases in which termination was granted, but retained bargaining rights for 1,587 employees in the 70 cases that were either dismissed or withdrawn.

Of the 116 cases that were either granted or dismissed, dispositions in 55 were based on the results of representation votes. A total of 1,620 employees were eligible to vote in the 55 elections that were held, of whom 1,428 or 88 percent cast ballots. Of those who cast ballots, 334 voted for continued representation by unions and 1,094 voted against. (Table 6).

Declaration of Successor Trade Union

In 1984-85, the Board dealt with 71 applications for declarations under section 62 of the Act, on the bargaining rights of successor trade unions resulting from a union merger or transfer of jurisdiction, compared to 22 in 1983-84.

Affirmative declarations were issued by the Board in 42 cases, 2 cases were withdrawn, proceedings were adjourned sine die in one case, and 26 cases were pending at March 31, 1985.

Declaration of Successor or Common Employer

In 1984-85, the Board dealt with 282 applications for declarations under section 63 of the Act, on the bargaining rights of trade unions at a successor employer resulting from a business sale, or for declarations under section 1(4) to treat two companies as one employer. The two types of request are often made in a single application.

Affirmative declarations were issued by the Board in 18 cases, 97 cases were either settled or withdrawn by the parties, 23 cases were dismissed, proceedings were terminated or adjourned sine die in 39 cases, and 105 cases were pending at March 31, 1985.

Accreditation of Employer Organizations

Four applications were processed under sections 125 through 127 of the Act for accreditation of employer organizations as bargaining agents of employers in the construction industry. Accreditation was granted in one case affecting 67 firms employing 788 workers; and three cases were pending at March 31, 1985.

Declaration and Direction of Unlawful Strike

In 1984-85, the Board dealt with one case seeking a declaration under section 92 against an alleged unlawful strike by employees in the construction industry. The case was dismissed.

Twelve applications were dealt with seeking directions under section 92 against alleged unlawful strikes by employees in non-construction industries. Directions were issued in 4 cases, 3 were withdrawn or settled, proceedings were adjourned sine die in 4 cases, and 1 case was pending at March 31, 1985.

Twenty-five applications were also processed, seeking directions under section 135 of the Act against alleged unlawful strikes by construction workers. Directions were issued in 4 cases, 2 cases were dismissed, 3 were withdrawn or settled, proceedings were terminated or adjourned sine die in 13 cases, and 3 were pending at March 31, 1985.

Declaration and Direction of Unlawful Lock-out

Six applications were processed in 1984-85, seeking declarations under section 93 of the Act against alleged unlawful lock-out by construction employers. One case was dismissed, one was withdrawn, proceedings were terminated in three cases, and one was pending at March 31, 1985.

Nine applications were also processed in seeking directions under section 93 of the Act against alleged unlawful lock-outs by non-construction employers. A declaration was issued in one case, three cases were dismissed, proceedings were terminated in three cases, and two were pending at March 31, 1985.

Consent to Prosecute

In 1984-85, the Board dealt with 14 applications under section 101 of the Act, requesting consent to institute prosecution in court against trade unions and employers for alleged commission of offences under the Act.

Of the 14 applications processed, which included three carried over from the previous year, 11 were disposed of, one was adjourned sine die and two were pending at March 31, 1985. Of the cases disposed of, two were dismissed, seven were withdrawn, and proceedings were terminated in two cases.

Complaints of Contravention of Act

Complaints alleging contraventions of the Act may be filed with the Board for processing under section 89 of the Act. In handling these cases the Board emphasizes voluntary settlements by the parties involved, with the assistance of a labour relations officer.

In 1984-85, the Board received 920 complaints under this section, an increase of 5 percent over the 872 filed in 1983-84. In complaints against employers, the principal charges were alleged illegal discharge or discrimination of employees for union activity in violation of sections 64 and 66 of the Act, illegal changes in wages and working conditions contrary to section 79, and failure to bargain in good faith under section 15. These charges were made mostly in connection with applications for certification. The principal charge against trade unions was alleged failure to represent employees fairly in grievances against their employer.

In addition to the complaints received, 153 cases were carried over from 1983-84. Of the 1,073 total processed, 729 were disposed of, proceedings were adjourned sine die in 73 cases, and 271 cases were pending at March 31, 1985.

In 583 or 80 percent of the 729 dispositions, voluntary settlements and withdrawal of the complaint were secured by labour relations officers (Table 4), remedial orders were issued by the Board in 30 cases, 93 cases were dismissed, and proceedings were terminated in the remaining 23 cases.

In the settlements secured by labour relations officers compensation amounting to about $358,200 was made to aggrieved employees, as well as offers of reinstatement in many cases. In the 30 cases in which violations of the Act were found by the Board, employers and unions were ordered to pay full compensation to 87 employees for wages and benefits lost in a specified period, and 47 of these employees were also ordered reinstated. Four other employees were reinstated but were not awarded compensation.

In addition, employers in 10 cases were ordered to post a Board notice of the employees' rights under the Act, and cease and desist directions were issued to employers in 3 other cases.

Construction Industry Grievances

Grievances over alleged violation of the provisions of a collective agreement in the construction industry may be referred to the Board for resolution under section 124 of the Act. As with complaints of contraventions of the Act, the Board encourages voluntary settlement of these cases by the parties involved, with the assistance of a labour relations officer.

In 1984-85, the Board received 751 cases under this section, a decrease of ten percent from the 824 filed in 1983-84. The principal issues in these grievances were alleged failure by employers to make required contributions to health and welfare, pension and vacation funds and deduction of union dues, and alleged violation of the subcontracting and hiring arrangements in the collective agreement.

In addition to the cases received, 77 were carried over from 1983-84. Of the total 828 processed, 620 were disposed of, proceedings were adjourned sine die in 99 cases, and 109 cases were pending at March 31, 1985.

In 561 or 90 percent of the 620 dispositions, voluntary settlements and withdrawal of the grievance were obtained by labour relations officers, awards were made by the Board in 34 cases, 16 cases were dismissed, and proceedings were terminated in the remaining 9 cases. (Table 4).

Payments totalling about $1,657,600 were recovered for unions and employees in the case settled by labour relations officers and those in which Board awards were made.

MISCELLANEOUS APPLICATIONS AND COMPLAINTS

Right of Access

In 1984-85, the Board dealt with six applications in which the union sought access to the employer's property under section 11 of the Act. Three cases were settled, one case was withdrawn, proceedings were adjourned sine die in one case, and one case was pending at March 31, 1985.

Religious Exemption

Ten applications were processed under section 47 of the Act, seeking exemption for employees from the union security provisions of collective agreements because of their religious beliefs. Exemption was granted in one case, five cases were dismissed, proceedings were adjourned sine die in one case, and three cases were pending at March 31, 1985.

Early Termination of Collective Agreements

Twenty-one applications were processed under section 52(3) of the Act, seeking early termination of collective agreements. Consent was granted in 19 cases, one case was withdrawn, and one was pending at March 31, 1985.

Union Financial Statements

Thirteen complaints were dealt with under section 85 of the Act, alleging failure by trade unions to furnish members with audited financial statements of the union's affairs. Consent was granted in one case, one case was dismissed, one was withdrawn, proceedings were terminated in five cases, and five were pending at March 31, 1985.

Jurisdictional Disputes

Thirty complaints were dealt with under section 91 of the Act, involving union work jurisdiction. Three cases were dismissed, 6 were settled or withdrawn, proceedings were terminated in 5 cases, and 16 cases were pending at March 31, 1985.

Determination of Employee Status

The Board dealt with 80 applications under section 106(2) of the Act, seeking decisions on the status of individuals as employees under the Act. Thirty-three cases were settled or withdrawn by the parties in discussions with labour relations officers (Table 4). Determinations were made by the Board in 8 cases, in which 18 of the 21 persons in dispute were found to be employees under the Act. Two cases were dismissed, proceedings were terminated or adjourned sine die in 3 cases, and 34 cases were pending at March 31, 1985.

Referrals by Minister of Labour

In 1984-85, the Board dealt with 22 cases referred by the Minister under section 107 of the Act for opinions on questions related to the Minister's authority to appoint a conciliation officer under section 16 of the Act, or an arbitrator under section 44 or 45. Determinations were made in 8 cases, in which the Board declared the Minister's authority to appoint a conciliation officer; 3 cases were settled or withdrawn; proceedings were terminated in 8 cases; and 3 cases were pending at March 31, 1985.

One case was referred to the Board by the Minister under section 139(4) of the Act, concerning the designations of the employee and the employer agencies in a bargaining relationship in the industrial, commercial and institutional sector of the construction industry. The case was pending at March 31, 1985.

Trusteeship Reports

Four statements were filed with the Board during the year reporting that local unions had been placed under trusteeship.

Occupational Health and Safety Act

In 1984-85, the Board received 45 complaints under section 24 of the Occupational Health and Safety Act, alleging wrongful discipline or discharge of employees for acting in compliance with the Act. Nine cases were carried over from 1983-84.

Of the total cases processed, 29 were settled or withdrawn by the parties in discussions with labour relations officers (Table 4). Three cases were granted and 7 were dismissed by the Board, proceedings were terminated or adjourned sine die in 3 cases, and the remaining 12 were pending at March 31, 1985.

Colleges Collective Bargaining Act

Five complaints were dealt with under section 78 of the Colleges Collective Bargaining Act, alleging contraventions of the Act. Two cases were withdrawn or settled, 2 were dismissed, and in one case proceedings were terminated. One case was adjourned sine die, and 27 were pending at March 31, 1985.

Four applications were dealt with under section 82 for decisions on the status of individuals as employees under the Act. A determination was made by the Board in one case, two cases were settled or withdrawn, and proceedings were adjourned sine die in one case.

Statistics on the cases under the Colleges Collective Bargaining Act dealt with by the Board are included in Table 1.

VIII BOARD PUBLICATIONS

The Ontario Labour Relations Board publishes the following:

The *Ontario Labour Relations Board Report*, a monthly publication of selected Board decisions which also contains other information and statistics on proceedings before the Board.

A Guide to the Ontario Labour Relations Act, a booklet explaining in laymen's terms the provisions of the *Labour Relations Act* and the Board's practices. This publication is revised periodically to reflect current law and Board practices. The Guide is also available in French.

Monthly Highlights, a publication in leaflet form containing brief summaries of significant Board decisions on a monthly basis. This publication also contains Board notices of interest to the industrial relations community and information relating to new appointments, retirements and other internal developments.

Pamphlets, the two pamphlets published by the Board to date ("Rights of Employees, Employers, and Trade Unions" and "Certification by the Ontario Labour Relations Board") have been well received. These pamphlets have been translated into French, Italian and Portuguese. During the year under review the Board published a third pamphlet entitled, "Unfair Labour Practice Proceedings before the Ontario Labour Relations Board." This pamphlet describes unfair labour practice proceedings before the Board and contains instructions on filling out form 58.

All of the Board's publications may be obtained by calling; writing, or visiting the Board's offices. The Ontario Labour Relations Board Report is available on annual subscriptions, presently priced at $42.00. Individual copies of the report may be purchased at the Government of Ontario Bookstore.

IX STAFF AND BUDGET

At the end of the fiscal year 1984-85, the Board employed a total of 101 persons on a full time basis. The Board has two types of employees. The Chairman, Alternate-Chairman, Vice-Chairmen and Board Members are appointed by the Lieutenant Governor in Council. The administrative, field and support staff are civil service appointees.

The total budget of the Ontario Labour Relations Board for the fiscal year was $4,698,600.00.

X STATISTICAL TABLES

The following statistics are indicative of the activities of the Ontario Labour Relations Board during the fiscal year 1984-85.

Table 1: Total Applications and Complaints Received, Disposed of and Pending, Fiscal Year 1984-85

Table 2: Applications and Complaints Received and Disposed of, Fiscal Years 1980-81 to 1984-85

Table 3: Labour Relations Officer Activity in Cases Processed, Fiscal Year 1984-85

Table 4: Labour Relations Officer Settlements in Cases Disposed of, Fiscal Year 1984-85

Table 5: Results of Representation Votes Conducted, Fiscal Year 1984-85

Table 6: Results of Representation Votes in Cases Disposed of, Fiscal Year 1984-85

Table 7: Time Required to Process Applications and Complaints Disposed of, by Major Type of Case, Fiscal Year 1984-85

Table 8: Union Distribution of Certification Applications Received and Disposed of, Fiscal Year 1984-85

Table 9: Industry Distribution of Certification Applications Received and Disposed of, Fiscal Year 1984-85

Table 10: Employees Covered by Certification Applications Granted, Fiscal Year 1984-85

Table 11: Time Required to Process Certification Applications Granted, Fiscal Year 1984-85

Table 1

Total Applications and Complaints Received, Disposed of and Pending
Fiscal Year 1984-85

	Caseload			Disposed of, Fiscal Year 1984-85							
Type of Case	**Total**	**Pending April 1, 84**	**Received Fiscal Year 1984-85**	**Total**	**Granted***	**Dismissed**	**Termi-nated**	**With-drawn**	**Settled**	**Sine Die**	**Pending March 31, 1985**
Total	**4,043**	**534**	**3,509**	**2,866**	**915**	**378**	**83**	**580**	**910**	**236**	**941**
Certification of Bargaining Agents	1,298	150	1,148	985	673	171	7	134	—	15	298
Declaration of Termination of Bargaining Rights	183	28	155	139	68	48	1	22	—	—	44
Declaration of Successor Trade Union	71	3	68	44	42	—	—	2	—	1	26
Declaration of Successor Employer or Common Employer Status	282	53	229	145	18	23	7	22	75	32	105
Accreditation	4	1	3	1	1	—	—	—	—	—	3
Declaration of Unlawful Strike	1	1	—	1	—	1	—	—	—	—	—
Declaration of Unlawful Lockout	6	4	2	5	—	1	3	1	—	—	1
Direction respecting Unlawful Strike	37	2	35	24	8	2	8	3	3	9	4
Direction respecting Unlawful Lockout	9	5	4	7	1	3	3	—	—	—	2
Consent to Prosecute	14	3	11	11	—	2	2	7	—	1	2
Contravention of Act	1,073	153	920	729	30	93	23	242	341	73	271
Right to Access	6	4	2	4	—	—	—	1	3	1	1
Exemption from Union Security Provision in Collective Agreement	10	—	10	6	1	5	—	—	—	1	3
Early Termination of Collective Agreement	21	4	17	20	19	—	—	1	—	—	1
Trade Union Financial Statement	13	4	9	8	1	1	5	1	—	—	5
Jurisdictional Dispute	30	11	19	14	—	3	5	5	1	—	16
Referral on Employee Status	80	17	63	44	8	2	1	17	16	2	34

(Cont'd)

Table 1 (Cont'd)

Total Applications and Complaints Received, Disposed of and Pending Fiscal Year 1984-85

	Caseload			Disposed of, Fiscal Year 1984-85							
Type of Case	**Total**	**Pending April 1, 84**	**Received Fiscal Year 1984-85**	**Total**	**Granted***	**Dismissed**	**Terminated**	**Withdrawn**	**Settled**	**Sine Die**	**Pending March 31, 1985**
Total	**4,043**	**534**	**3,509**	**2,866**	**915**	**378**	**83**	**580**	**910**	**236**	**941**
Referral from Minister on Appointment of Conciliation Officer or Arbitrator	22	4	18	19	8	—	8	2	1	—	3
Referral of Construction Industry Grievance	828	77	751	620	34	16	9	111	450	99	109
Referral from Minister on Construction Bargaining Agency	1	1	—	—	—	—	—	—	—	—	1
Complaint under Occupational Health and Safety Act	54	9	45	40	3	7	1	9	20	2	12

* Includes cases in which a request was granted or a determination made by the Board.

Table 2

Applications and Complaints Received and Disposed of Fiscal Years 1980-81 to 1984-85

Type of Case	Number Received, Fiscal Year						Number Disposed of, Fiscal Year					
	Total	1980-81	1981-82	1982-83	1983-84	1984-85	Total	1980-81	1981-82	1982-83	1983-84	1984-85
Total	**14,991**	**2,836**	**2,749**	**2,762**	**3,135**	**3,509**	**13,427**	**2,711**	**2,608**	**2,445**	**2,797**	**2,866**
Certification of bargaining agents	5,018	1,152	1,089	758	871	1,148	4,848	1,178	1,101	767	817	985
Declaration of termination of bargaining rights	596	104	98	115	124	155	567	111	78	120	119	139
Declaration of successor trade union or employer	367	55	50	47	22	193	290	54	35	51	19	131
Declaration of common employer status	392	37	36	41	174	104	266	29	30	31	118	58
Accreditation	8	2	1	1	1	3	9	5	—	3	—	1
Declaration of unlawful strike or lockout	22	6	4	3	7	2	21	7	3	2	3	6
Directions respecting unlawful strike or lockout	313	76	59	76	63	39	220	47	34	61	47	31
Consent to prosecute	83	22	17	18	15	11	73	23	10	17	12	11
Contravention of Act	3,861	705	640	724	872	920	3,516	704	622	674	787	729
Referral of construction industry grievance	3,474	517	551	831	824	751	2,866	421	516	577	732	620
Miscellaneous	857	160	204	148	162	183	751	132	179	142	143	155

Table 3

Labour Relations Officer Activity in Cases Processed*
Fiscal Year 1984-85

		Cases in Which Activity Completed						
			Settled					
Type of Case	Total Cases Assigned	Total	Number	Percent	Referred to Board	Sine Die	Pending
Total	**2,317**	**1,961**	**1,633**	**83.3**	**170**	**158**	**356**
Certification	680	600	553	92.2	45	2	80
Interim certificate	63	39	36	92.3	2	1	24
Pre-hearing application.	94	75	57	76.0	18	—	19
Other application	523	486	460	94.7	25	1	37
Contravention of Act	816	643	511	79.5	74	58	173
Construction industry grievance	745	657	526	80.1	36	95	88
Employee status	32	25	19	76.0	5	1	7
Occupational Health and Safety Act	44	36	24	66.7	10	2	8

* Includes all cases assigned to labour relations officers, which may or may not have been disposed of by the end of the year.

Table 4

Labour Relations Officer Settlements in Cases Disposed of*
Fiscal Year 1984-85

		Officer Settlements	
Type of Case	Total Disposed of	Number	Percent of Dispositions
Total	**1,433**	**1,206**	**84.2**
Contravention of Act	729	583	80.0
Construction industry grievance	620	561	90.5
Employee status	44	33	75.0
Occupational Health and Safety Act	40	29	72.5

* Includes only cases in which labour relations officers play the leading role in the processing of the case. The figures refer to cases disposed of during the year and should not be confused with data for the same types of cases in Table 3. Table 3 refers to new assignments of cases made to labour relations officers during the year which may or may not have been disposed of by the end of the year.

Table 5

Results of Representation Votes Conducted*
Fiscal Year 1984-85

Type of Case	Number of Votes	Eligible Employees	Ballots Cast: Total	Ballots Cast: In Favour of Unions
Total	**230**	**14,578**	**11,930**	**6,042**
Certification	170	12,753	10,329	5,616
Pre-hearing cases				
One union	38	4,662	3,632	1,735
Two unions	25	1,848	1,619	790
Construction cases				
One union	1	7	7	1
Regular cases				
One union	91	5,217	4,082	2,390
Two unions	15	1,019	989	700
Termination of Bargaining Rights	56	1,633	1,440	332
Successor Employer	4	192	161	94

* Refers to all representation votes conducted and the results counted during the fiscal year, regardless of whether or not the case was disposed of during the year.

Table 6

Results of Representation Votes in Cases Disposed of*
Fiscal Year 1984-85

	Number of Votes			Eligible Votes			All Ballots Cast			Ballots Cast in Favour of Unions		
					In Votes			In Votes			In Votes	
Type of Cases	**Total**	**Won**	**Lost**	**Total**	**Won**	**Lost**	**Total**	**Won**	**Lost**	**Total**	**Won**	**Lost**
Total	**224**	**98**	**126**	**14,881**	**8,281**	**6,600**	**12,205**	**6,390**	**5,815**	**6,479**	**4,641**	**1,838**
Certification	165	91	74	13,069	7,983	5,086	10,616	6,126	4,490	6,046	4,476	1,570
Pre-hearing cases												
One union	37	17	20	4,658	1,742	2,916	3,628	1,118	2,510	1,732	788	944
Two union	27	15	12	2,322	1,204	1,118	2,055	1,040	1,015	1,152	849	303
Construction cases												
One union	2	-	2	13	-	13	12	-	12	3	-	3
Regular cases												
One union	83	43	40	4,826	3,787	1,039	3,744	2,791	953	2,249	1,929	320
Two unions	16	16	-	1,250	1,250	-	1,177	1,177	-	910	910	-
Termination of Bargaining Rights	55	5	50	1,610	131	1,489	1,428	125	1,303	334	71	263
Successor Employer	4	2	2	192	167	25	161	139	22	99	94	5

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* Refers to final representation votes conducted in cases disposed of during the fiscal year. This table should not be confused with Table 5 which refers to all representation votes conducted during the year regardless of whether or not the case was disposed of during the year.

Table 7

Time Required to Process Applications and Complaints Disposed of, by Major Type of Case Fiscal Year 1984-85

Time Taken (Calendar Days)	All Cases		Certification Cases		Section 89 Cases		Section 124 Cases		All Other Cases	
	Dispositions	Cumulative Percent	Dispositions	Cumulative Percent	Dispositions	Cumulative Percent	Dispositions	Cumulative Percent	Dispositions	Cumulative Percent
Total	**2,866**	**100.0**	**985**	**100.0**	**729**	**100.0**	**620**	**100.0**	**532**	**100.0**
Under 8 days	49	1.7	6	0.6	9	1.2	20	3.2	14	2.6
8-14 days	313	12.6	93	10.1	34	5.9	175	31.5	11	4.7
15-21 days	560	32.2	313	41.8	45	12.1	177	60.0	25	9.4
22-28 days	289	42.3	168	58.9	57	19.9	39	66.3	25	14.1
29-35 days	165	48.0	50	64.0	68	29.2	31	71.3	16	17.1
36-42 days	152	53.3	50	69.0	61	37.6	20	74.5	21	21.1
43-49 days	204	60.4	46	73.7	98	51.0	16	77.1	44	29.3
50-56 days	169	66.3	36	77.4	89	63.2	12	79.0	32	35.3
57-63 days	92	69.5	25	79.9	30	67.4	11	80.8	26	40.2
64-70 days	80	72.3	22	82.1	16	69.5	11	82.6	31	46.1
71-77 days	84	75.3	24	84.6	21	72.4	11	84.4	28	51.3
78-84 days	57	77.3	24	87.0	12	74.1	1	84.5	20	55.1
85-91 days	46	78.9	12	88.2	16	76.3	7	85.6	11	57.1
92-98 days	45	80.4	9	89.1	13	78.1	9	87.1	14	59.8
99-105 days	35	81.6	8	89.9	8	79.1	5	87.9	14	62.4
106-126 days	87	84.7	19	91.9	18	81.6	20	91.1	30	68.0
127-147 days	67	87.0	10	92.9	22	84.6	9	92.6	26	72.9
148-168 days	83	89.9	10	93.9	32	89.0	4	93.2	37	79.9
Over 168 days	289	100.0	60	100.0	80	100.0	42	100.0	107	100.0

Table 8

Union Distribution of Certification Applications Received and Disposed of Fiscal Year 1984-85

Union	Number of Applications Received	Number of Applications Disposed of			
		Total	Certified	Dismissed**	Withdrawn
All Unions	**1,148**	**985**	**673**	**178**	**134**
CLC* Affiliates	**599**	**512**	**349**	**105**	**58**
Air Line Employees	1	—	—	—	—
Aluminum Brick and Glass Workers	2	1	1	—	—
Auto Workers	46	38	29	4	5
Bakery and Tobacco Workers	3	2	1	1	—
Broadcast Employees	1	—	—	—	—
Canadian Brewery Workers	15	15	13	2	—
Canadian Paperworkers	4	4	3	1	—
Canadian Public Employees (CUPE)	67	73	53	8	12
CLC Directly Chartered	5	4	2	2	—
Clothing and Textile Workers	6	5	4	1	—
Communications & Electronics	1	1	1	—	—
Electrical Workers (UE)	7	6	4	1	1
Energy and Chemical Workers	13	13	6	5	2
Food and Commercial Workers	88	61	32	26	3
Glass, Pottery & Plastic Wkrs.	1	—	—	—	—
Graphic Communications Union	5	4	1	2	1
Hotel Employees	70	40	18	8	14
Ladies Garment Workers	3	3	2	1	—
Leather & Plastic Workers	—	2	2	—	—
Machinists	3	4	4	—	—
Molders	7	8	4	3	1
Newspaper Guild	3	1	1	—	—
Office and Professional Employees	7	6	6	—	—
Ontario Public Service Employees	50	34	31	2	1
Public Service Alliance	—	2	2	—	—
Railway Clerks	1	1	1	—	—
Railway, Transport and General Workers	2	2	2	—	—
Retail Wholesale Employees	68	60	39	14	7
Rubber Workers	2	2	—	1	1
Seafarers	1	1	—	—	1
Service Employees International	54	62	43	13	6
Theatrical Stage Employees	3	2	1	1	—
Transit Union (Intl.)	2	2	1	1	—

Table 8 (Cont'd.)

Typographical Union	4	3	3	—	—
United Steelworkers	50	46	36	7	3
United Textile Workers	1	1	1	—	—
Woodworkers	3	3	2	1	—

* Canadian Labour Congress.
** Includes cases that were terminated.

Non-CLC Affiliates	**549**	**47**	**324**	**73**	**76**
Allied Health Professionals	3	3	2	1	—
Boilermakers*	7	5	4	—	1
Bricklayers International*	10	7	5	—	2
Carpenters*	83	72	47	15	10
Canadian Educational Workers	1	1	1	—	—
Canadian Operating Engineers	16	17	7	8	2
Canadian Restaurant Employees	1	1	—	—	1
Christian Labour Association	15	11	7	1	3
Electrical Workers (IBEW)*	12	15	14	1	—
Food and Service Workers	2	1	1	—	—
Guards Association	3	3	3	—	—
Headwear Workers	1	1	1	—	—
Independent Local Union	33	29	20	3	6
International Operating Engineers*	38	35	21	5	9
Labourers*	96	88	56	12	20
Multi-Union	1	1	—	—	1
National Council of Canadian Labour	3	3	1	2	—
Ontario Nurses Association	26	25	24	1	—
Ontario Secondary School Teachers	34	3	1	2	—
Painters*	10	10	8	2	—
Plant Guard Workers	5	5	5	—	—
Plumbers*	26	27	20	5	2
Sheet Metal Workers*	17	15	11	3	1
Structural Iron Workers*	12	12	8	—	4
Teamsters	83	72	47	11	14
Textile and Chemical Union	5	5	4	1	—
Textile Processors	6	6	6	—	—

* These construction unions were reported as CLC (Canadian Labour Congress) affiliates in the 1981-82 report. In April 1982, following suspension by the Congress of its 12 building trades affiliates, the Asbestos Workers, Boilermakers, Bricklayers, Electrical Workers (IBEW), International Operating Engineers, Painters Plasterers, Plumbers and Sheet Metal Workers joined with the Elevator Constructors to form the Canadian Federation of Labour. The Carpenters, Labourers, and Structural Iron Workers have not joined the Federation.
** Includes cases that were terminated.

Table 9

Industry Distribution of Certification Applications Received and Disposed of Fiscal Year 1984-85

Industry	Number of Applications Received	Number of Applications Disposed of			
		Total	Certified	Dismissed*	Withdrawn
All Industries	**1,148**	**985**	**673**	**178**	**134**
Manufacturing	**257**	**231**	**169**	**39**	**23**
Food, beverages	44	42	32	2	8
Tobacco products	—	—	—	—	—
Rubber, plastic products	21	23	18	5	—
Leather industries	3	3	3	—	—
Textile mill products	8	5	3	1	1
Knitting mills	—	—	—	—	—
Clothing industries	6	6	5	1	—
Wood products	16	14	10	2	2
Furniture, fixtures	11	8	4	3	1
Paper, allied products	5	5	3	2	—
Printing, publishing	12	9	7	2	—
Primary metal industries	9	8	6	2	—
Metal fabricating industries	41	36	27	4	5
Machinery, except electrical	13	11	8	1	2
Transportation equipment	17	14	9	4	1
Electrical products	14	12	10	1	1
Non-metallic mineral products	9	7	5	2	—
Petroleum, coal products	—	—	—	—	—
Chemical, chemical products	10	11	8	1	2
Miscellaneous manufacturing	18	17	11	6	—
Non-Manufacturing	**891**	**754**	**504**	**139**	**111**
Agriculture	—	—	—	—	—
Forestry	—	—	—	—	—
Fishing, trapping	—	—	—	—	—
Mining, quarrying	6	5	3	2	—
Transportation	39	33	24	3	6
Storage	3	2	2	—	—
Communications	1	1	1	—	—
Electric, gas, water	11	11	7	2	2
Wholesale trade	45	34	23	8	3
Retail trade	81	70	52	14	4
Finance, insurance	8	7	5	2	—
Real Estate	9	12	9	2	1
Education, related services	77	37	27	6	4
Health, welfare services	146	148	120	20	8
Religious organizations	1	2	1	1	—
Recreational services	11	15	8	3	4
Management services	15	11	6	1	4
Personal services	8	9	3	6	—
Accommodation, food services	129	87	34	33	20
Other services	35	30	16	6	8

Table 9 (Cont'd)

Industry Distribution of Certification Applications Received and Disposed of Fiscal Year 1984-85

Industry	Number of Applications Received	Number of Applications Disposed of			
		Total	Certified	Dismissed*	Withdrawn
Non-Manufacturing	**891**	**754**	**504**	**139**	**111**
Federal government	—	—	—	—	—
Provincial government	—	—	—	—	—
Local government	14	16	7	4	5
Other government	—	—	—	—	—
Construction	252	224	156	26	42

* Includes cases that were terminated.

Table 10

Employees Covered by Certification Applications Granted Fiscal Year 1984-85

Employee Size*	Total		Construction**		Non-Construction	
	Number of Applications	Number of Employees	Number of Applications	Number of Employees	Number of Applications	Number of Employees
Total	**673**	**24,997**	**153**	**1,022**	**520**	**23,975**
2-9 employees	257	1,226	128	505	129	721
10-19 employees	126	1,761	16	221	110	1,540
20-39 employees	132	3,668	7	199	125	3,469
40-99 employees	102	6,300	2	97	100	6,203
100-199 employees	32	4,257	—	—	32	4,257
200-499 employees	21	6,037	—	—	21	6,037
500 employees or more	3	1,748	—	—	3	1,748

* Refers to the total number of employees in one or more bargaining units certified in an application. A total of 735 bargaining units were certified in the 673 applications in which certification was granted.

** Refers to cases processed under the construction industry provisions of the Act. This figure should not be confused with the 156 certified construction industry applications shown in Table 9, which includes all applications involving construction employers whether processed under the construction industry provisions of the Act or not.

Table 11

Time Required to Process Certification Applications Granted*
Fiscal Year 1984-85

Calendar Days	Total Certified		Non-Construction		Construction	
	Number	Cumulative Per Cent	Number	Cumulative Per Cent	Number	Cumulative Per Cent
Total	**673**	**100.0**	**520**	**100.0**	**153**	**100.0**
Under 8 days	1	0.1	—	—	1	0.7
8-14 days	61	9.2	23	4.4	38	25.5
15-21 days	240	44.9	202	43.3	38	50.3
22-28 days	132	64.5	108	64.0	24	66.0
29-35 days	40	70.4	30	69.8	10	72.5
36-42 days	27	74.4	22	74.0	5	75.8
43-49 days	28	78.6	24	78.7	4	78.4
50-56 days	18	81.3	15	81.5	3	80.4
57-63 days	17	83.8	14	84.2	3	82.4
64-70 days	15	86.0	15	87.1	—	—
71-77 days	14	88.1	11	89.2	3	84.3
78-84 days	16	90.5	10	91.2	6	88.2
85-91 days	8	91.7	4	91.9	4	90.8
92-98 days	8	92.9	6	93.1	2	92.2
99-105 days	6	93.8	6	94.2	—	—
106-126 days	9	95.1	7	95.6	2	93.5
127-147 days	6	96.0	5	96.5	1	94.1
148-168 days	5	96.7	4	97.3	1	94.8
169 days and over	22	100.0	14	100.0	8	100.0

* Refers only to applications in which certification was granted. This table should not be confused with Table 7 which refers to all certification applications disposed of during the year regardless of the method of disposition.

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